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Flores v. Cooper Tire & Rubber Co., 218 Ariz. 52, 178 P.3d 1176, ¶¶ 27–31 (Ct. App. 2008) (television station broadcast story based on documents Cooper claimed were subject to confidentiality order, and requested that television station disclose source of documents; television station sought declaratory judgment action that it had complied with confidentiality order; court held that, by bringing that action, television station did not waive privilege).

Flores v. Cooper Tire & Rubber Co., 218 Ariz. 52, 178 P.3d 1176, ¶¶ 32–35 (Ct. App. 2008) (television station broadcast story based on documents Cooper claimed were subject to confidentiality order, and requested television station disclose source of documents; television station sought declaratory judgment action that it had complied with confidentiality order; television station disclosed it had obtained documents from whistle-blower; court held that, by disclosing that it had obtained documents from whistle-blower, television station did not waive privilege for name of whistle-blower).

P.M. v. Gould (Moore), 212 Ariz. 541, 136 P.3d 223, ¶¶ 8, 35–36 (Ct. App. 2006) (defendant was convicted of sexual conduct with minor and sexual assault on his daughter; although at first sentencing state never presented any of victim's records or communications with her counselor, trial court found as aggravating circumstance emotional harm to victim and imposed aggravated sentence; defendant had to be resentenced after *Blakeley*; trial court held that, in order for state to prove emotional harm to victim and for defendant to have effective cross-examination at resentencing, victim must disclose records and communications with her counselor, and held that, because it had already found emotional harm as aggravating circumstance at first sentencing, that finding resulted in victim waiving her privilege for any relevant records; court noted that victim is not a party to criminal case and thus does not control conduct that could support finding of waiver, and therefore held that victim had not waived her rights or placed her medical or behavioral health conditions at issue merely because she testified as witness).

State v. Wilson, 200 Ariz. 390, 26 P.3d 1161, ¶¶ 15–18 (Ct. App. 2001) (state charged defendant with fraudulent scheme and artifice as result of filing claims for workers' compensation benefits; court noted (1) state, not defendant, sought to call doctor, (2) defendant did not threaten third party with physician-patient privilege and then invoke privilege, and (3) defendant did not testify or otherwise disclose substance of communication, and thus concluded defendant had not waived privilege by conduct, thus trial court properly precluded state from questioning doctor who saw defendant for independent medical examination).

Elia v. Pifer, 194 Ariz. 74, 977 P.2d 796, ¶¶ 37–40 (Ct. App. 1998) (defendant was plaintiff's former attorney in dissolution action; after dissolution, plaintiff filed for bankruptcy; plaintiff sued defendant for legal malpractice, claiming defendant did not have authority to agree to terms of proposed settlement agreement; court held that plaintiff's claim of malpractice placed in issue communications with bankruptcy attorneys because, if plaintiff never told them defendant settled dissolution without his approval, it would give rise to inference that defendant had not committed malpractice, and if plaintiff had told them and they failed to follow his instructions to attack dissolution decree in bankruptcy proceeding, they might be negligent, which would reduce defendant's share of the liability; court rejected plaintiff's contention that his suing former dissolution attorney only waived attorney-client privilege with that attorney, and held instead that, because of the nature of the claim, it also waived attorney-client privilege with bankruptcy attorneys).

501.27.030 By making a claim of ineffective assistance of counsel, the defendant waives the attorney-client privilege.

State v. Cuffle, 171 Ariz. 49, 51–53, 828 P.2d 773, 775–77 (1992) (although defendant did not make direct claim that his attorney provided ineffective assistance of counsel, by claiming he did not know nature of charges and thus no contest plea was involuntary, defendant implicitly, if not explicitly, questioned competency of his attorney, and therefore waived attorney-client privilege to extent necessary to resolve that question).

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State v. Zuck, 134 Ariz. 509, 515–16, 658 P.2d 162, 168–69 (1982) (defendant contended trial counsel failed to communicate with him, failed to honor his request for speedy trial, and failed to prepare for trial adequately; court held defendant, by his attack on counsel’s competency, waived the attorney-client privilege for contentions asserted).

State v. Moreno, 128 Ariz. 257, 260, 625 P.2d 320, 323 (1981) (defendant claimed ineffective assistance by trial counsel; by claiming attorney provided ineffective assistance of counsel, defendant waived attorney-client privilege to extent necessary to resolve that question).

State v. Paris-Sheldon, 214 Ariz. 500, 154 P.3d 1046, ¶ 15 (Ct. App. 2007) (defendant asked trial court to appoint new counsel based on what she contended attorney had said and had failed to do; trial court held informal hearing and asked attorney about what he had said to defendant; defendant contended trial court’s questioning of attorney violated attorney-client privilege; court held that, when defendant made claim based on what she claimed attorney had said, trial court was required to question attorney about statements, thus to that extent, defendant had waived attorney-client privilege).

501.27.040 When a defendant contends a plea was involuntary because the trial court did not inform of certain matter, what the defendant’s attorney told the defendant then becomes relevant, thus by making a claim of an involuntary plea, the defendant waives the attorney-client privilege.

State v. Cuffle, 171 Ariz. 49, 51–53, 828 P.2d 773, 775–77 (1992) (although defendant did not claim attorney provided ineffective assistance of counsel, by claiming he did not know nature of charges and thus no contest plea was involuntary, defendant implicitly, if not explicitly, questioned competency of attorney, and thus waived attorney-client privilege to extent necessary to resolve question).

State v. Lawonn, 113 Ariz. 113, 114, 547 P.2d 467, 468 (1976) (court held that, by raising on appeal issue of lack of knowledge of rights waived by guilty plea, defendant waived attorney-client privilege so that trial court could determine what defendant’s attorney told defendant).

Waitkus v. Maunet, 157 Ariz. 339, 340, 757 P.2d 615, 616 (Ct. App. 1988) (by attacking competency of attorney, defendant waived attorney-client privilege; trial court exceeded authority in ordering defendant to disclose attorney’s work product and trial preparation files).

501.27.050 In a case when a litigant claiming the attorney-client privilege relies on a subjective and allegedly reasonable evaluation of the law and advances that evaluation as a claim or defense, and this evaluation of the law necessarily incorporates what the litigant learned from its attorneys, the communications are discoverable and admissible, but when a litigant claiming the attorney-client privilege defends exclusively on the basis that its actions were objectively reasonable and merely asked its attorneys to evaluate the reasonableness of its conduct under the statutes and case law, the party has not waived the attorney-client privilege because it has not put at issue any advice it received from its attorneys.

Empire West Title Agency v. Talamante (Dos Land Holdings L.L.C.), 234 Ariz. 497, 323 P.3d 1148, ¶¶ 1–16 (2014) (Dos sent Empire closing instruction letter (CIL) with attached legal description of property that included access easement that was essential for economic development of property and asked Empire to make sure conveyance documents used same legal description; contrary to instructions, legal description in conveyance documents prepared by Empire did not contain access easement; Dos sued Empire and alleged it reasonably believed easement description was in all documents used at closing; court held this statement did not waive attorney-client privilege).

State Farm v. Lee (Martin), 199 Ariz. 52, 13 P.3d 1169, ¶¶ 15, 22, 28 (2000) (plaintiffs brought class action against defendant contending breach of contract, fraud, bad faith, and consumer fraud for refusing to allow policyholders to “stack” uninsured and underinsured motorist provisions of multiple policies; defendant claimed its conduct was reasonable based on knowledge gained from its evaluation of existing case law, applicable statutes, and policies themselves; court held that, because de-

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defendant's knowledge included information gained from consulting with its attorneys, trial court correctly ordered disclosure of communications defendant had with attorneys).

Everest Indem. Ins. Co. v. Rea (Rudolfo Bros. Plastering, Inc.), 236 Ariz. 503, 342 P.3d 417, ¶¶ 5–12 (Ct. App. 2015) (Rudolfo contended Everest committed bad faith by entering into settlement agreement with others that exhausted liability coverage; Everest contended it made decision to settle in good faith based on subjective beliefs concerning relative merits of available courses of action; although Everest communicated with counsel in process of making that decision, there was no showing that defense was dependent on advice or consultation with counsel, so no showing Everest waived attorney-client privilege).

Mendoza v. McDonald's Corp., 222 Ariz. 139, 213 P.3d 288, ¶¶ 35–53 (Ct. App. 2009) (plaintiff sued for breach of implied covenant of good faith and fair dealing in administration of her workers' compensation claim; plaintiff awarded \$250,000 in compensatory damages, but no punitive damages; court concluded defendant affirmatively asserted its actions in investigating, evaluating, and paying plaintiff's claim were subjectively reasonable, thus trial court erred in refusing to order disclosure of attorney-client communications and remanded for new trial on issue of punitive damages).

501.27.060 When a party testifies about otherwise privileged communications, or denies having relevant communications that would otherwise be privileged, the party waives the privilege for those communications, and may be impeached by the other party to those communications.

State v. Harrod, 200 Ariz. 309, 26 P.3d 492, ¶¶ 34–37 (2001) (defendant testified and denied he had any conversations with his ex-wife about the murder; court held trial court properly allowed ex-wife to testify about conversations she had with defendant about the murder).

501.27.070 Because (1) Arizona allows full cross-examination of expert witnesses, (2) the rules of civil procedure allow full discovery of expert witnesses, and (3) it is beneficial to have a bright-line for discovery for expert witnesses who are both consulting experts and testifying experts, if a party designates a consulting expert as a testifying expert, the party will waive any work-product privilege for communications with that expert.

Arizona Indep. Redist. Comm'n v. Fields, 206 Ariz. 130, 75 P.3d 1088, ¶¶ 42–50 (Ct. App. 2003) (Arizona Independent Redistricting Commission hired National Demographics Corporation as lead consultant in redistricting process; court held that, because IRC named NDC personnel as testifying experts, IRC waived any legislative privilege for communication with those experts, any materials reviewed by them, and subject of expert's testimony).

501.27.080 If a party designates a consulting expert as a testifying expert, the party may re-establish the work-product privilege for communications with that expert if the party withdraws that expert as a testifying witness.

Green v. Nygaard (Green), 213 Ariz. 460, 143 P.3d 393, ¶¶ 8–19 (Ct. App. 2006) (wife had listed expert witness as testifying expert witness; at pre-decree hearing addressing parties' possession of liquid assets *pendente lite*, wife had expert witness testify; parties later stipulated to division of assets; wife then withdrew designation of witness as testifying expert; court held that trial court erred in ordering disclosure of expert witness's entire file).

501.27.090 If a party allows a witness to refresh the witness's memory with a writing subject to a privilege, the party waives the privilege, and the writing becomes subject to production under Rule 612.

Samaritan Health Serv. v. Superior Ct., 142 Ariz. 435, 690 P.2d 154 (Ct. App. 1984) (defendant allowed witnesses to refresh their memories with interview summaries containing attorney's impressions and thought processes as well as factual matters).

501.27.100 A person will usually waive the privilege if the person makes the statement when a third person is present on the ground that the person holding the privilege could not have intended to be confidential those communications the person knowingly allowed to be overheard by someone foreign to

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the confidential relationship; this general rule does not apply when third person's presence does not indicate a lack of intent to keep the communication confidential.

Abeyta v. Soos (Sierra Tucson, Inc. & Sonntag), 234 Ariz. 190, 319 P.3d 996, ¶ 16 (Ct. App. 2014) (Gary Abeyta and Paul Bruno were engaged in a long-time domestic relationship; Abeyta began counseling with Sonntag, and on Sonntag's advice, Bruno joined Abeyta in counseling; Sonntag told them that all communications with one would be communicated to the other, and Sonntag kept only one chart; later on Sonntag's recommendation, Bruno checked into Sierra Tucson, and while there, injured his back, so he brought suit against Sierra Tucson and Sonntag; Abeyta sought protective order to prevent disclosure of chart from joint counseling and to preclude questioning him about that chart when he was being deposed; court held, even assuming Bruno could be considered third party to Abeyta's therapy, nothing in Abeyta's communications with Bruno suggests an intent to waive his privilege).

Accomazzo v. Kemp (Accomazzo), 234 Ariz. 169, 319 P.3d 231, ¶¶ 13–15 (Ct. App. 2014) (although wife's parents attended some meetings with wife and her attorney, wife avowed she relied on her parents to assist her in understanding prenuptial agreement and that she believed her communications with parents and attorney were confidential, thus wife did not waive attorney-client privilege, so trial court erred in ordering disclosure).

State v. Archibeque, 223 Ariz. 231, 221 P.3d 1045, ¶¶ 15–25 (Ct. App. 2009) (defendant and wife were members of Church of Jesus Christ of Latter-day Saints; wife told Church Bishop defendant admitted to her he had inappropriately touched step-daughter; defendant and wife then met with Bishop, and defendant admitted sexually touching step-daughter; because purpose of discussion was both repentance process and spiritual guidance and marital advice, court concluded neither presence of wife during discussions with Bishop nor defendant's statement to wife prior to meeting with Bishop waived privilege).

State ex rel. Thomas v. Schneider (Hanna et al.), 212 Ariz. 292, 130 P.3d 991, ¶ 33 (Ct. App. 2006) (notary and city clerk backdated financial disclosure statements city council members did not timely file; communications were between city attorney and members of city council and city clerk about these events, made both in private and during executive sessions of the city council; court noted that A.R.S. § 38–431.03(F) provides that no disclosure of information in executive session constitutes waiver on any privilege, including attorney-client privilege).

State v. Sucharew, 205 Ariz. 16, 66 P.3d 59, ¶¶ 13–16 (Ct. App. 2003) (state alleged defendant and Doyle were racing when defendant's vehicle collided with victim's vehicle, killing him; to obtain testimony, state granted immunity to Doyle (a minor); when cross-examining Doyle, defendant sought to question him about conversations he had with his attorney, and state objected on basis of attorney-client privilege, which trial court sustained; defendant contended privilege was waived because Doyle's parents were present when he spoke to attorney; court noted Doyle's parents had hired and paid for attorney, and that their presence was result of their taking interest and advisory role in their minor son's legal affairs, thus their presence during communications did not indicate lack of intent to keep communication confidential, so there was no waiver of attorney-client privilege).

State v. Foster, 199 Ariz. 39, 13 P.3d 781, ¶¶ 9–16 (Ct. App. 2000) (defendant was suspect in murder investigation, and his parole officer returned him to AzDOC; while there, defendant contacted inmate who was "legal representative" and asked for assistance in preparing for parole violation hearing; after defendant confessed to "legal representative" that he killed victim, "legal representative" then told police of confession; because defendant made statements to "legal representative" while another inmate was present, defendant could not claim conversations were privileged).

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501.27.110 Absent a contrary showing, when a client authorizes a parent to participate with client's attorney in conferences about the client's personal matters and the client and parent have no adverse interests about those matters, the court will presume the client has a reasonable expectation that the conferences will be confidential.

Accomazzo v. Kemp (Accomazzo), 234 Ariz. 169, 319 P.3d 231, ¶¶ 13–16 (Ct. App. 2014) (wife's parents initially located attorney and made initial payment for services, and parents assisted wife in understanding prenuptial agreement; court held husband presented no evidence to rebut presumption of confidentiality, thus trial court erred in ordering disclosure).

501.27.120 Once a party has waived a privilege at a trial or otherwise, that party may not reassert that privilege.

State v. Harrod, 218 Ariz. 268, 183 P.3d 519, ¶¶ 11–16 (2008) (at trial, defendant testified and denied he had any conversations with his ex-wife about the murder; court held defendant waived marital communication privilege and that trial court properly allowed ex-wife to testify about conversations she had with defendant about the murder; court held this waiver continued through resentencing proceedings and thus trial court properly allowed ex-wife to testify at resentencing).

501.27.130 Relying on juvenile characteristics and claiming transient immaturity does not *ipso facto* equate to a mental health defense, nor would it negate an element of the crime, thus it does not waive the physician-patient or psychologist-patient privilege.

Cabanas v. Pineda, 246 Ariz. 12, 433 P.3d 560, ¶¶ 17–25 (Ct. App. 2018) (court held that, until defendant relies on mental health records or otherwise places his mental status at issue, state was not entitled to disclosure of his mental health records or to mental health evaluation).

28. Comment on Exercise of Privilege.

501.28.010 A party commits reversible error if it comments on the failure of the other party to call a privileged witness.

State v. Herrera, 203 Ariz. 131, 51 P.3d 353, ¶¶ 15–17 (Ct. App. 2002) (during jury voir dire, trial court listed defendant's wife as potential witness; in opening statement, defendant told jurors wife would testify about certain matters; defendant later told trial court he had changed his mind and was invoking marital privilege so wife could not testify; trial court told jurors wife would not be excluded from courtroom because defendant had invoked marital privilege and thus wife would not be witness; after trial court concluded marital privilege did not apply because defendant was charged with child abuse, trial court told jurors wife would testify; because defendant did not object at trial, on appeal court analyzed issue for fundamental error; because jurors acquitted defendant of child abuse, court found defendant was not prejudiced for those counts; for DUI counts, court concluded wife's testimony was favorable, and that favorable testimony dispelled any improper inference jurors might have drawn from defendant's attempt to invoke marital privilege, thus no fundamental error).

29. Improper Disclosure of Confidential Communications.

501.29.010 If a person has received confidential communications from another and discloses them without the other person's consent, the person may be liable for damages.

Barnes v. Outlaw, 188 Ariz. 401, 937 P.2d 323 (Ct. App. 1996) (although defendant was a pastor, he treated plaintiff as a psychological therapist, so cleric/priest-penitent privilege did not apply; court upheld judgment against defendant on plaintiff's claim of counseling malpractice based on defendant's disclosure of confidential communications), *vac'd in part on other grounds*, 192 Ariz. 283, 964 P.2d 484 (1998).

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Rule 502. Attorney-Client Privilege and Work Product; Limitations on Waiver.

The following provisions apply, in the circumstances set out, to disclosure of a communication or information covered by the attorney-client privilege or work-product protection.

(a) Disclosure made in an Arizona proceeding; scope of a waiver. When the disclosure is made in an Arizona proceeding and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in an Arizona proceeding only if:

- (1) the waiver is intentional;
- (2) the disclosed and undisclosed communications or information concern the same subject matter; and
- (3) they ought in fairness to be considered together.

(b) Inadvertent disclosure. When made in an Arizona proceeding, the disclosure does not operate as a waiver in an Arizona proceeding if:

- (1) the disclosure is inadvertent;
- (2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and
- (3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following Arizona Rule of Civil Procedure 26(b)(6)(B).

(c) Disclosure made in a proceeding in federal court or another state. When the disclosure is made in a proceeding in federal court or another state and is not the subject of a court order concerning waiver, the disclosure does not operate as a waiver in an Arizona proceeding if the disclosure:

- (1) would not be a waiver under this rule if it had been made in an Arizona proceeding; or
- (2) is not a waiver under the law governing the federal or state proceeding where the disclosure occurred.

(d) Controlling effect of a court order. An Arizona court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court—in which event the disclosure is also not a waiver in any other proceeding.

(e) Controlling effect of a party agreement. An agreement on the effect of disclosure in an Arizona proceeding is binding only on the parties to the agreement, unless it is incorporated into a court order.

(f) Definitions. In this rule:

- (1) “attorney-client privilege” means the protection that applicable law provides for confidential attorney-client communications; and
- (2) “work-product protection” means the protection that applicable law provides for tangible material (or its intangible equivalent) prepared in anticipation of litigation or for trial.

Cases

502.b.010 A disclosure does not operate as a waiver in an Arizona proceeding if: (1) the disclosure is inadvertent; (2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and (3) the holder promptly took reasonable steps to rectify the error, including following Arizona Rule of Civil Procedure 26.1(f)(2) Ethical Rule 4.4(b).

Lund v. Myers (Lund/ Miller/ Olson/ Page), 232 Ariz. 309, 305 P.3d 374, ¶¶ 2–20 (2013) (in 2006, Bradford Lund filed petition to create guardianship for himself; 2 months later, Jennings, Strouss & Salmon appeared for Bradford and withdrew petition; in 2009, Bradford’s relatives (Lund/ Miller/ Olson/ Page, collectively LMOP) asked court to appoint guardian and conservator for Bradford, which Bradford,

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father, and step-mother (collectively Lunds) opposed; in 9/2011, LMOP's attorney (Murphy of Burch & Cracchiolo) served subpoena on JS&S asking for all "nonprivileged" documents; attorney at JS&S mistakenly thought Murphy represented Bradford and provided Murphy (and B&C) with entire client file (239 pages) without reviewing it for privileged information; on 10/03, Bradford's attorney (Shumway) learned JS&S had given entire client file to Murphy; on 10/04, Shumway sent Murphy e-mail saying he believed file contained at least two privileged documents that should be returned, and that he would tell Murphy if further review revealed other privileged documents; Murphy said he would await further word; after not hearing from Shumway for 3 weeks, Murphy distributed copies of the entire file to all other counsel; on 11/14, Lunds filed motion to disqualify Murphy and B&C because Murphy had read, kept, and distributed privileged material; on 11/15, JS&S moved to intervene in order to file motion to compel Murphy and B&C to comply with E.R 4.4(b) and Rule 26.1(f)(2), Ariz. R. Civ. P.; 11/16, Lunds filed emergency motion to prevent Murphy from disclosing file to trial court and for trial court to order file returned to JS&S; at 11/29 hearing, trial court permitted Murphy to retain file, but not copy any documents or convey to anyone, and ordered JS&S to create privilege log, which JS&S filed on 12/09; on 1/13, trial court order JS&S to file under seal detailed explanation of legal basis of privilege claim for each document for which claim was made and give each party copy of each document and explanation; trial court intended to review each document and counsels' arguments before ruling on whether documents were privileged; LMOP objected to trial court's reviewing documents *in camera* and filed special action requesting stay; court held Rule 26.1(f)(2) outlined proper procedure for claiming privilege and resolving disputes, and E.R 4.4(b) provided further procedures when there is inadvertent disclosure, and held party does not violate Rule 26.1(f)(2) by presenting information to trial court under seal; court further held, because of Lunds' motion to disqualify Murphy and B&C based on claim of privileged material, court held trial court had to determine whether documents were indeed privileged and thus properly ordered JS&S to produce privilege log, but erred by ruling it would review all documents to determine whether they were privileged, and instead should have awaited response to privilege log and considered parties' arguments about privilege and waiver to determine whether *in camera* review was necessary for any particular document).

Burch & Cracchiolo (Lund, Olson, and Page) v. Myers (Bradford Lund), 237 Ariz. 369, 351 P.3d 376, ¶¶ 14–35 (Ct. App. 2015) (in 2006, Bradford Lund filed petition to create guardianship for himself; 2 months later, Jennings, Strouss & Salmon appeared on behalf of Bradford and withdrew petition; in 2009, Bradford's relatives (Lund/Olson/Page, collectively LOP) asked court to appoint guardian and conservator for Bradford, which Bradford and his father and step-mother (collectively Lunds) opposed; in 9/2011, LOP's attorney (Murphy of Burch & Cracchiolo) served subpoena on JS&S asking for all "nonprivileged" documents; attorney at JS&S mistakenly thought Murphy represented Bradford and provided Murphy (and B&C) with entire client file (239 pages) without reviewing it for privileged information; on 10/03, Bradford's attorney (Shumway) learned JS&S had given entire file to Murphy; on 10/04, Shumway sent Murphy e-mail saying he believed file contained at least two privileged documents that should be returned, and that he would inform Murphy if further review revealed other privileged documents; Murphy said he would await further word from Shumway; after not hearing from Shumway for 3 weeks, Murphy distributed copies of the entire file to all other counsel; on 11/14, Lunds filed motion to disqualify Murphy and B&C on grounds Murphy had read, kept, and distributed privileged material; in preparation for defense against motion to disqualify, Murphy reviewed in detail entire client file, making notes and preparing index; after Arizona Supreme Court issued its 2013 opinion, trial court appointed special master to review arguments and documents; after reviewing special master's report and reviewing certain documents *in camera*, trial court determined B&C had violated Rule 26.1(f)(2) and granted Lunds' motion to disqualify Murphy and B&C; on appeal, court held Lunds' motion to disqualify Murphy and B&C did not waive attorney-client privilege, and further held trial court did not abuse discretion in granting motion to disqualify).

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ARTICLE 6. WITNESSES

Rule 601. Competency To Testify in General.

Every person is competent to be a witness unless these rules or an applicable statute provides otherwise.

Comment to 2012 Amendment

The language of Rule 601 has been amended to conform to the federal restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Cases

601.010 Every person is competent to be a witness except as provided by statute or by the rules.

State v. Cruz, 218 Ariz. 149, 181 P.3d 196, ¶¶ 104–06 (2008) (state called witness who was visibly intoxicated; court noted that court will presume witness is competent and that witness is not rendered incompetent merely because witness was under influence of drugs at time of testimony).

601.050 The determination whether to require a witness to undergo a mental or physical examination is within the sound discretion of the trial court.

State v. Moore, 222 Ariz. 1, 213 P.3d 150, ¶¶ 45–48 (2009) (because witness was talking rapidly and got “off track” during questioning, defendant asked trial court to order witness to undergo drug test; court noted video recording of witness’s testimony showed she was coherent and responded appropriately to questioning, even though she had tendency to ramble and interrupt counsel, thus trial court did not abuse discretion in finding witness competent to testify and in not ordering drug test).

601.060 A witness having undergone hypnosis may testify only about matters that the witness recalled and related before hypnosis, and the party offering this testimony must show that proper forensic hypnosis guidelines were followed.

State v. Harrod, 200 Ariz. 309, 26 P.3d 492, ¶¶ 20–22 (2001) (although witness submitted to attempt to hypnotize, witness did not succumb to hypnosis, thus trial court found witness had not been successfully hypnotized, and thus properly allowed witness to testify).

601.065 In determining whether a witness has undergone hypnosis, the trial court must make that determination by a preponderance of the evidence.

State v. Harrod, 200 Ariz. 309, 26 P.3d 492, ¶¶ 22–26 (2001) (trial court found by preponderance of evidence that witness had not been successfully hypnotized, but stated that, if standard were clear and convincing evidence, it would not have so found).

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Rule 602. Need for Personal Knowledge.

A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may consist of the witness's own testimony. This rule does not apply to a witness's expert testimony under Rule 703.

Comment to 2012 Amendment

The language of Rule 602 has been amended to conform to the federal restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Cases

602.010 For a witness to testify about a matter, the witness must have personal knowledge of the matter.

State v. Harrod, 200 Ariz. 309, 26 P.3d 492, ¶¶ 27–28 (2001) (in case-in-chief, defendant suggested ex-wife and her family were lying about his involvement in murder because of bitterness over divorce; court held this opened door and allowed state to call ex-wife in rebuttal to ask her why she had divorced defendant; ex-wife testified that she divorced him because he told her he had killed victim).

- * *State v. Murray (Easton)*, 247 Ariz. 447, 451 P.3d 803, ¶¶ 10–12 (Ct. App. 2019) (prosecutor asked victim if he recognized what was depicted in photograph that appeared to show dark-colored bale wrapped in clear plastic, and victim said no; prosecutor then asked if victim thought he knew what photograph depicted, trial court overruled defendant's objection that question had been asked and answered, prosecutor restated question, asking victim if he "[knew] what [the photograph] might be," and victim said, "No. I don't know what was in the black bag"; prosecutor then asked, "Do you think you know what [photograph is] even though it doesn't look familiar to you?" victim then answered, "I think I know what it is, it was in the house"; when asked what he thought it was, victim replied that it was marijuana; court held trial court had discretion to allow prosecutor to continue to probe victim about contents of photograph even after victim initially expressed unfamiliarity with it, and further held, because answer was cumulative to other evidence that defendant had brought marijuana to residence, any error was harmless).

CalX-tra v. W.V.S.V. Holdings, 229 Ariz. 377, 276 P.3d 11, ¶¶ 55–57 (Ct. App. 2012) (plaintiff's statement of who gave him documents was based on his own knowledge, thus statement was not hearsay).

In re MH 2008–002596, 223 Ariz. 32, 219 P.3d 242, ¶¶ 12–16 (Ct. App. 2009) (appellant sought relief from order of commitment for involuntary mental health treatment; statute required testimony of two or more witnesses acquainted with patient; appellant contended one witness did not qualify as acquaintance witness because her contact with him was limited to one 15 minute telephone conversation; court held that this telephone conversation gave witness personal knowledge).

State v. Jones, 188 Ariz. 534, 937 P.2d 1182 (Ct. App. 1996) (because examining physician saw victim write note stating that her father had molested her, physician properly allowed to identify note).

602.040 A witness may testify that something did not happen or that the witness did not see or hear anything only if the witness's position, attitude, or access to information were such that the witness probably would have seen, heard, or known of the event if it had happened.

Isbell v. State, 198 Ariz. 291, 9 P.3d 322, ¶ 9 (2000) (because defendant failed to show how many near accidents and how many fortuitous escapes from injury may have occurred, trial court did not abuse discretion in precluding evidence of absence of prior accidents at railroad crossing in question).

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Rule 603. Oath or Affirmation To Testify Truthfully.

Before testifying, a witness must give an oath or affirmation to testify truthfully. It must be in a form designed to impress that duty on the witness's conscience.

Comment to 2012 Amendment

The language of Rule 603 has been amended to conform to the federal restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Cases

603.010 In the absence of an objection and something on the record to indicate otherwise, there exists the presumption of regularity in administering the oath.

State v. Navarro, 132 Ariz. 340, 342, 645 P.2d 1254, 1256 (Ct. App. 1982) (in absence of objection, presumption that interpreter administered oath in Spanish to Spanish-speaking witness; objection required so trial court may cure any alleged error at trial).

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Rule 604. Interpreters.

An interpreter must be qualified and must give an oath or affirmation to make a true translation.

Comment to 2012 Amendment

The language of Rule 604 has been amended to conform to the federal restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Cases

604.010 The determination whether an interpreter is qualified is left to the sound discretion of the trial court.

In re MH 2007–001895, 221 Ariz. 346, 212 P.3d 38, ¶¶ 9–12 (Ct. App. 2009) (at mental health evaluation hearing, trial court used interpreter from Language Line Services, who translated via speaker phone; court held trial court did not abuse discretion in determining interpreter was qualified).

604.020 This rule requires only that an interpreter be “court qualified”; there is no requirement that an interpreter be “court certified.”

In re MH 2007–001895, 221 Ariz. 306, 212 P.3d 38, ¶¶ 9–13 (Ct. App. 2009) (at mental health evaluation hearing, trial court used interpreter from Language Line Services, who translated via speaker phone; court rejected claim that interpreter had to be “court certified”).

604.030 Although the determination whether an interpreter is qualified is a matter for the trial court, a party may still impeach the interpreter’s translation, this resolution being for the jurors.

State v. Marcham, 160 Ariz. 52, 770 P.2d 356 (Ct. App. 1988) (interpreter was for deaf juror).

State v. Burris, 131 Ariz. 563, 643 P.2d 8 (Ct. App. 1982) (trial court allowed party to cross-examine interpreter about misinterpretations, and should have allowed party’s own interpreter to testify).

604.040 A presumption exists, based on the oath of the interpreter, that the interpreter will make a proper interpretation of the proceedings.

In re MH 2007–001895, 221 Ariz. 306, 212 P.3d 38, ¶¶ 14–15 (Ct. App. 2009) (at mental health evaluation hearing, trial court used interpreter from Language Line Services, who translated via speaker phone; because appellant made no claim to trial court that interpreter was not translating properly, appellate court presumed that all parties were able to hear and understand the proceedings).

State v. Mendoza, 181 Ariz. 472, 891 P.2d 939 (Ct. App. 1995) (because of presumption, lack of transcript of communications between a deaf juror and court-appointed sign-language interpreter did not deny defendant his due process rights).

State v. Marcham, 160 Ariz. 52, 770 P.2d 356 (Ct. App. 1988) (interpreter was for deaf juror; because defendant did not object, there was nothing in record to indicate sign-language interpreter did not properly interpret proceedings, thus presumption applied).

604.050 If a party is contending that the interpreter failed to translate simultaneously all crucial proceedings, the party must present that claim first to the trial court so that the trial court will be able to address and correct any problems that exist; if the party does not make such a claim to the trial court, that party will be considered to have waived any error on appeal.

In re MH 2007–001895, 221 Ariz. 306, 212 P.3d 38, ¶¶ 14–15 (Ct. App. 2009) (at mental health evaluation hearing, trial court used interpreter from Language Line Services, who translated via speaker phone; because appellant made no claim to trial court that interpreter was not translating properly, appellate court presumed all parties were able to hear and understand proceedings; court held appellant waived any objection that she did not receive continuous simultaneous translation).

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604.060 The failure of an interpreter to translate simultaneously all crucial proceedings may deny a defendant due process of law.

State v. Hansen, 146 Ariz. 226, 705 P.2d 466 (Ct. App. 1985) (although defendant understood some English, record was ambiguous whether defendant knew enough English to proceed without interpreter; because many important parts of proceedings were not translated, defendant was denied due process of law).

604.070 There is no authority for the proposition that only a “trained interpreter” may testify in English to the meaning of words heard in another language, thus a witness who is bilingual may testify in English to the meaning of what he or she personally heard and understood in another language.

* *State v. Murray (Easton)*, 247 Ariz. 447, 451 P.3d 803, ¶¶ 5–6 (Ct. App. 2019) (victim testified that, during confrontation, defendant said to his brother in Jamaican Patois “shoot him, shoot the boy”).

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Rule 605. Competency of Judge as Witness.

The judge presiding at trial may not testify as a witness at the trial. A party need not object to preserve the issue.

Comment to 2012 Amendment

The language of Rule 605 has been amended to conform to the federal restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Cases

605.010 A judge presiding at a trial may not testify in that trial as a witness, thus if the judge has personal knowledge of a disputed evidentiary fact or may be a material witness in the proceeding, the judge should disqualify him- or herself.

State v. Fisher, 176 Ariz. 69, 859 P.2d 179 (1993) (defendant's wife entered into plea agreement that required her to testify consistently with her prior statements, and trial judge signed it along with other parties; because this agreement was admitted in evidence at defendant's trial and because effect of this agreement on wife was a matter of dispute, this put judge in a position where he should have disqualified himself).

605.020 A trial judge may testify in a different proceeding about factual matters, but may not testify about what judge would have done in the first proceeding if faced with a different situation.

Reed v. Mitchell & Timbanard, 183 Ariz. 313, 903 P.2d 621 (Ct. App. 1995) (plaintiff claimed that attorneys were negligent because they did not include a security agreement in divorce decree; first judge would not have been allowed to testify whether he would have signed decree if security agreement had been included in it).

DeForest v. DeForest, 143 Ariz. 627, 694 P.2d 1241 (Ct. App. 1985) (first judge entered order that marriage would be dissolved upon presentment of formal decree, which was never prepared; 1½ years later second judge entered *nunc pro tunc* decree; first judge allowed to testify about terms of settlement agreement).

State v. Miller, 128 Ariz. 112, 624 P.2d 309 (Ct. App. 1980) (judge who presided at civil trial involving defendant allowed to testify at defendant's criminal trial and give opinion of defendant's credibility).

605.030 Trial judge should not communicate with jurors without notifying the parties and giving them the opportunity to be present.

State v. McDaniel, 136 Ariz. 188, 665 P.2d 70 (1983) (any communication between judge and jurors after jurors begin deliberations, without prior notice to defendant and counsel, is error; trial court erred in answering questions from jurors, but error was harmless).

State v. Mata, 125 Ariz. 233, 609 P.2d 48 (1980) (during trial, juror asked bailiff to clarify what one witness had said, and judge told bailiff to tell juror to rely on testimony he had heard; another juror asked bailiff if defendant and his brother were being tried together, and trial court told bailiff to tell juror that would be clarified by court's instructions; because judge did not give any information to jurors, court held any error was harmless).

605.040 If the trial judge communicates with jurors without notifying the parties, a party must object upon learning of such contact to allow the trial court to correct any error; if the party does not object, the party will have waived any claim of error.

State v. Mata, 125 Ariz. 233, 609 P.2d 48 (1980) (when it appeared one juror may have seen defendant in handcuffs, parties agreed to have judge question juror with reporter but without attorneys; during

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trial, juror who was pregnant told judge she might not be able to continue, so judge discussed matter with juror and her doctor, and later told attorney what had happened, and no one objected; court held any error waived for lack of a timely objection).

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* = 2019 Case

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Rule 606. Juror's Competency as a Witness.

(a) At the Trial. A juror may not testify as a witness before the other jurors at the trial. If a juror is called to testify, the court must give a party an opportunity to object outside the jury's presence.

(b) During an Inquiry into the Validity of a Verdict in a Civil Case.

(1) *Prohibited Testimony or Other Evidence.* During an inquiry into the validity of a verdict in a civil case, a juror may not testify about any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict or indictment. The court may not receive a juror's affidavit or evidence of a juror's statement on these matters.

(2) *Exceptions.* A juror may testify about whether:

- (A)** extraneous prejudicial information was improperly brought to the jury's attention;
- (B)** an outside influence was improperly brought to bear on any juror; or
- (C)** a mistake was made in entering the verdict on the verdict form.

Comment to 2012 Amendment

This rule has been amended to conform to Federal Rule of Evidence 606, including the addition of subdivision (b)(2)(C). However, subsection (b) has not been applied to criminal cases, as is done in Federal Rule of Evidence 606(b), because the matter is covered by Arizona Rule of Criminal Procedure 24.1(d).

Additionally, the language of Rule 606 has been amended to conform to the federal restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent in the restyling to change any result in any ruling on evidence admissibility.

Cases**Paragraph (b) — Inquiry into validity of verdict in civil action.**

606.b.010 Trial court may consider an affidavit that alleges (A) extraneous prejudicial information was improperly brought to jurors' attention; (B) an outside influence was improperly brought to bear on any juror; or (C) a mistake was made in entering the verdict on the verdict form.

American Power Prod. v. CSK Auto, 239 Ariz. 151, 367 P.3d 55, ¶¶ 2–5 (2016) (on breach of contract and negligent misrepresentation claim, trial lasted 12 trial days and included 24 witnesses and 164 exhibits; on Friday afternoon before 3-day weekend, jurors received case at about 2:15; juror's affidavit stated that bailiff came into jury room and someone asked her how long deliberations typically lasted, and bailiff told them an hour or two should be plenty; jurors returned verdict at 4:13;).

606.b.020 When there has been an *ex parte* communication with the jurors, the court does not presume prejudice, and instead conducts a two-prong inquiry: (1) was there an improper communication; and (2) was the communication prejudicial or merely harmless.

American Power Prod. v. CSK Auto, 239 Ariz. 151, 367 P.3d 55, ¶ 11 (2016) (after 12-day trial with 24 witnesses and 164 exhibits, once jurors began deliberations, one juror asked bailiff how long deliberations typically lasted, and bailiff said an hour or two should be plenty; jurors returned verdict after 2 hours; parties agreed bailiff's statement was improper, so court focused on whether information was prejudicial).

606.b.030 The trial court may not consider an affidavit or question the jurors about the validity of a verdict in a civil case, and a juror may not testify about any statement made or incident that occurred during the jury's deliberations, the effect of anything on that juror's or another juror's vote, or any juror's mental processes concerning the verdict or indictment.

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American Power Prod. v. CSK Auto, Inc., 235 Ariz. 509, 334 P.3d 199, ¶¶ 4–8 (Ct. App. 2014) (on breach of contract and negligent misrepresentation claim, trial lasted 12 trial days and included 24 witnesses and 164 exhibits; on Friday afternoon before 3-day weekend, jurors received case at about 2:15 and returned verdict at 4:13; affidavits from jurors said deliberations were not fair, most jurors refused to consider evidence and just wanted to go home, and that other jurors felt pressured to go along; because that part of affidavits described statements made or incidents that occurred during jurors' deliberations, effect that had another juror's vote, and juror's mental processes, trial court was not permitted to consider those parts of affidavits), *vac'd*, 239 Ariz. 151, 367 P.3d 55 (2016).

606.b.040 If a party requests a new trial based on juror misconduct, if there is a significant question about what occurred or whether the affiant is credible and whether the alleged facts, if true, would establish a basis for granting the motion, the court must hold an evidentiary hearing before ruling on a motion for new trial, but if there is no significant factual question, the trial court may grant or deny a motion for a new trial without holding an evidentiary hearing.

American Power Prod. v. CSK Auto, 239 Ariz. 151, 367 P.3d 55 ¶¶ 12–14 (2016) (juror's affidavit stated bailiff came into jury room, someone asked her how long deliberations typically lasted, and she told them an hour or two should be plenty; because there was no dispute about what had occurred, trial court was not required to hold evidentiary hearing).

606.b.060 When an improper communication creates a structural defect in the trial that deprives a litigant of an essential right, the trial judge must conclusively presume prejudice; in all other cases, because the court may not inquire into the effect of the communication on individual jurors, the court must determine whether the communication would likely prejudice a hypothetical average juror, and the moving party must demonstrate the objective likelihood of prejudice.

American Power Prod. v. CSK Auto, 239 Ariz. 151, 367 P.3d 55 ¶¶ 12–19 (2016) (juror's affidavit stated that bailiff came into room, someone asked her how long deliberations typically lasted, and she told them hour or two should be plenty; because bailiff's statement did not relate to any specific or disputed fact or strength of evidence presented by either side, nor did it involve any legal issue in case, trial court reasonably determined that bailiff's statement had no bearing on issues, thus trial court did not abuse its discretion in denying motion for new trial).

606.b.070 If there are improper communications with the jurors, the trial court should presume prejudice when the misconduct (1) is significant, (2) is prejudicial in nature but its extent is impossible to determine in a close case, and (3) is apparently successful.

Leavy v. Parsell, 188 Ariz. 69, 932 P.2d 1340 (1997) (trial court entered order precluding issue of seat belt defense, but in opening statement defendant's counsel mentioned plaintiff's non-use of seat belt and cross-examined a witness about whether plaintiff was wearing one; court presumed prejudice, and suggested trial court should have imposed a monetary sanction).

Perez v. Community Hosp., 187 Ariz. 355, 929 P.2d 1303 (1997) (bailiff told jurors (1) they could not have testimony reread, (2) what bailiff thought would happen if they said they were deadlocked, and (3) getting answer from trial court would take long time; because answers involved important substantive and procedural issues, information was incorrect, and nature of error prevented parties from demonstrating degree of resulting prejudice, court presumed prejudice).

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Rule 607. Who May Impeach a Witness.

Any party, including the party that called the witness, may attack the witness's credibility.

Comment to 2012 Amendment

The language of Rule 607 has been amended to conform to the federal restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Cases

607.010 The party calling a witness may impeach that witness.

State v. Acree, 121 Ariz. 94, 96, 588 P.2d 836, 838 (1978) (when police interviewed victim 2 days after assault, she said defendant pointed gun at her and had tried to shoot her; at trial, victim testified that defendant never pointed gun at her, that she did not believe defendant would have shot or harmed her, and that she could have blown entire matter out of proportion; state was then allowed to impeach victim's trial testimony with statement she made during police interview).

607.020 Rule 607 eliminated the requirement that a party could impeach its own witness only if it could show that it was surprised, and that the testimony was material and damaging.

State v. Acree, 121 Ariz. 94, 96, 588 P.2d 836, 838 (1978) (2 days after assault, victim told police defendant pointed gun at her and had tried to shoot her; at trial, victim testified that defendant never pointed gun at her, that she did not believe defendant would have shot or harmed her, and that she could have blown entire matter out of proportion; state was then allowed to impeach victim's trial testimony with statement she made during police interview; defendant contended that impeachment was improper because state was not surprised, damaged, or prejudiced by the testimony; court held Arizona Rules of Evidence eliminated surprise as prerequisite to impeaching one's own witness).

607.025 A prior inconsistent statement may be used for both substantive and impeachment.

State v. Huerstel, 206 Ariz. 93, 75 P.3d 698, ¶ 42 n.9 (2003) (defendant introduced statements from two inmates who claimed codefendant told them he shot victims; trial court then allowed state to introduce codefendant's statement in which he claimed defendant shot victims; court held admission of codefendant's statement to police violated Confrontation Clause, thus trial court erred in admitting it; court noted that use of prior inconsistent statement as substantive evidence is predicated on fact that witness who made statement testifies at trial and thus is subject to cross-examination, but when prior inconsistent statement is admitted under Rule 806, declarant has not testified at trial and thus is not subject to cross-examination, so only way statement could be used is for impeachment and not as substantive evidence).

State v. Acree, 121 Ariz. 94, 97, 588 P.2d 836, 839 (1978) (2 days after assault, victim told police defendant pointed gun at her and had tried to shoot her; at trial, victim testified defendant never pointed gun at her, that she did not believe defendant would have shot or harmed her, and she could have blown entire matter out of proportion; state was then allowed to impeach victim's trial testimony with statement she made during police interview; defendant contended trial court erred in allowing use of prior inconsistent statements for substantive purposes; court held evidence was admissible for substantive purposes).

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Rule 608. A Witness's Character for Truthfulness or Untruthfulness.

(a) Reputation or Opinion Evidence. A witness's credibility may be attacked or supported by testimony about the witness's reputation for having a character for truthfulness or untruthfulness, or by testimony in the form of an opinion about that character. But evidence of truthful character is admissible only after the witness's character for truthfulness has been attacked.

(b) Specific Instances of Conduct. Except for a criminal conviction under Rule 609, extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness. But the court may, on cross-examination, allow them to be inquired into if they are probative of the character for truthfulness or untruthfulness of:

- (1) the witness; or
- (2) another witness whose character the witness being cross-examined has testified about.

By testifying on another matter, a witness does not waive any privilege against self-incrimination for testimony that relates only to the witness's character for truthfulness.

Comment to 2012 Amendment

This rule has been amended to conform to Federal Rule of Evidence 608, including changing two references to "credibility" to "character for truthfulness" in subsection (b). Additionally, the language of Rule 608 has been amended to conform to the federal restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent in the restyling to change any result in any ruling on evidence admissibility.

Comment to Original 1977 Rule

State *ex rel.* Pope v. Superior Court (Grier), 113 Ariz. 22, 545 P.2d 946 (1976), is consistent with and interpretative of Rule 608(b).

Paragraph (a) — Opinion and reputation evidence of character.

608.a.015 A party may attack the credibility of a witness using opinion testimony only about the witness's character for truthfulness or untruthfulness.

State v. Nordstrom, 200 Ariz. 229, 25 P.3d 717, ¶ 76 (2001) (trial court allowed witness to give opinion that another witness was not trustworthy or honest when drinking heavily or using drugs; trial court properly precluded witness from giving opinion that the other witness had propensity for violence, being hot-tempered, and taking advantage of friends because those factors did not have bearing on character for truthfulness or untruthfulness.).

608.a.030 A party may not impeach a witness by vague or speculative matters.

State v. Hoskins, 199 Ariz. 127, 14 P.3d 977, ¶¶ 70–71 (2001) (defendant sought to cross-examine state's witness about another state's witness's reputation as "braggart" and "boaster"; court held proposed testimony was vague, speculative, and immaterial, thus trial court did not err in precluding that testimony).

Paragraph (b) — Specific instances of conduct.

608.b.010 The trial court may allow impeachment or rehabilitation with specific instances of conduct if it concludes the conduct is probative of truthfulness.

State v. Rienhardt, 190 Ariz. 579, 951 P.2d 454 (1997) (on cross-examination, defendant elicited inconsistent statement from state's key witness; trial court allowed state to introduce prior consistent statements on re-direct; court held such statements probative of truthfulness).

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State v. Gilfillan, 196 Ariz. 396, 998 P.2d 1069, ¶¶ 24–28 (Ct. App. 2000) (27-year-old defendant held knife to throat of 11-year-old victim, bound her wrists and ankles, performed oral sex on her, digitally penetrated her vagina, attempted penile penetration, and forced her to perform oral sex on him; DNA from sperm matched defendant's DNA; trial court did not abuse discretion in concluding defendant failed to establish that victim had made prior false accusations of sexual misconduct).

State v. Uriarte, 194 Ariz. 275, 981 P.2d 575, ¶¶ 20, 24 (Ct. App. 1998) (defendant was charged with child molestation, sexual conduct with minor, and public sexual indecency involving his 12-year-old sister-in-law; defendant's wife testified; trial court did not abuse discretion in admitting evidence that defendant's wife threatened victim and victim's mother with death if defendant was convicted).

608.b.020 The trial court should preclude impeachment with specific instances of conduct if it concludes that the conduct is not probative of truthfulness.

State v. Ellison, 213 Ariz. 116, 140 P.3d 899, ¶¶ 52–53 (2006) (in February 1999, victims were killed; victims' daughter testified she saw defendant working at her parents' house in July or August 1998; defendant sought to impeach her with defendant's Arizona Department of Corrections records that showed he was in prison from May 1998 through January 1999; court held that AzDOC records did not deal with daughter's conduct, thus they did not meet requirements of Rule 608).

State v. Murray, 184 Ariz. 9, 30–31, 906 P.2d 542, 563–64 (1995) (although witness admitted he had previously lied under, because it appeared he was merely mistaken in his testimony and thus never intentionally misled anyone, trial court concluded prior occasion was not probative of truthfulness).

State v. Prince, 160 Ariz. 268, 273, 772 P.2d 1121, 1126 (1989) (because pointing gun at person is not probative of truthfulness, trial court properly precluded this line of questioning).

State v. Oliver, 158 Ariz. 22, 31, 760 P.2d 1071, 1080 (1988) (evidence of sexual misconduct is not probative of truthfulness).

State v. Woods, 141 Ariz. 446, 449–50, 687 P.2d 1201, 1204–05 (1984) (trial court did not abuse discretion in concluding unauthorized cashing of check was not probative of truthfulness).

State v. Duarte, 246 Ariz. 338, 438 P.3d 707, ¶¶ 32–34 (Ct. App. 2018) (court held trial court did not abuse discretion in concluding victim's 13-year-old felony conviction for attempted first-degree hindering prosecution was not probative of truthfulness).

State v. Trujillo, 245 Ariz. 414, 430 P.3d 379, ¶ 33 (Ct. App. 2018) (defendant was charged with sexual abuse he allegedly committed on 15-year-old at refugee facility; after defendant's supervisor testified about rules concerning interaction with children at facility, defendant sought to introduce evidence that supervisor was fired because "he signed off on a slip that allowed [someone] to drive a vehicle they weren't supposed to drive," but trial court precluded this evidence; court held supervisor's failure to follow rule did not show character for untruthfulness).

State v. Lopez, 234 Ariz. 465, 323 P.3d 748, ¶¶ 24–26 (Ct. App. 2014) (defendant charged with arson of structure; defendant and victim's fiancé got into fight; defendant sought to introduce evidence that fiancé started fight, contending this showed victim lied when she told police defendant started fight and, by extension, lied when she reported that defendant threatened to burn down house; court held trial court properly precluded that evidence because it was collateral matter, and impeaching partly is bound by witness's answer and may not present extrinsic evidence to contradict witness).

State v. Doody, 187 Ariz. 363, 367, 375, 930 P.2d 440, 444, 452 (Ct. App. 1996) (because defendant made no showing prior burglaries, and conspiracy to commit murder and armed robbery were probative of truthfulness, trial court properly precluded that evidence).

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608.b.050 Specific instances of conduct may be introduced only by means of cross-examination, and may not be proved by extrinsic evidence, thus when cross-examining a witness in order to impeach the witness's testimony, the party is bound by the witness's answer.

State v. Lopez, 234 Ariz. 465, 323 P.3d 748, ¶¶ 24–26 (Ct. App. 2014) (defendant charged with arson of structure; defendant and victim's fiancé got into fight; defendant sought to introduce evidence that fiancé started fight, contending this showed victim lied when she told police defendant started fight and, by extension, lied when she reported that defendant threatened to burn down house; court held trial court properly precluded that evidence because it was collateral matter, and impeaching party is bound by witness's answer and may not present extrinsic evidence to contradict witness).

608.b.060 A party may not ask a witness on cross-examination about specific instances of conduct that are not true or that the party would not be able to prove by admissible evidence.

State v. Ellison, 213 Ariz. 116, 140 P.3d 899, ¶¶ 52–53 (2006) (in February 1999, victims were killed; victims' daughter testified she saw defendant working at her parents' house in July or August 1998; defendant sought to impeach her with defendant's Arizona DOC records that showed he was in prison from May 1998 through January 1999; trial court invited defendant's attorney to offer AzDOC records in evidence, but defendant's attorney did not do so; because defendant's attorney failed to offer AzDOC records in evidence, trial court did not abuse discretion in ruling that defendant's attorney could not use those records during cross-examination absent their admission in evidence).

State v. Madsen, 125 Ariz. 346, 349–50, 609 P.2d 1046, 1049–50 (1980) (prosecutor asked defendant's father if he had ever had to call police because of difficulties between defendant and his wife, and defendant's father denied ever having done so; state's witness who could have contradicted father's denial had already left; because state's witness could have testified, prosecutor asked question in good faith; because prosecutor did not pursue matter further, there was no prejudice).

State v. Holsinger, 124 Ariz. 18, 20–22, 601 P.2d 1054, 1056–58 (1979) (prosecutor asked witness, "Did I tell you that Jeannie Holsinger had a long criminal record and that's why I wanted to get her?"; because question implied defendant had criminal record when in fact she did not, and thus question implied existence of factual predicate that prosecutor could not support by evidence, question was improper, and because mere asking of question prejudiced defendant, court reversed conviction).

608.b.065 If the testimony of two witnesses is contradictory and that could be the result of poor ability or opportunity to perceive, faulty memory, mistake, or poor ability to relate what happened, asking one witness in those situations whether the other witness is lying is improper, but when the only possible explanation for the inconsistent testimony is deceit or lying, or when one witness has opened the door by testifying about the veracity of the other witness, asking one witness whether the other witness is lying may be proper.

State v. Canon, 199 Ariz. 227, 16 P.3d 788, ¶¶ 40–44 (Ct. App. 2000) (defendant claimed prosecutor acted improperly by asking him on cross-examination about differences between his testimony and officer's testimony and asking him to comment on officer's credibility; court held that, even if it assumed prosecutor's questions constituted misconduct, it was not so pervasive or pronounced that trial lacked fundamental fairness).

State v. Morales, 198 Ariz. 372, 10 P.3d 630, ¶¶ 8–15 (Ct. App. 2000) (defendant's testimony directly contradicted officers' testimony, prosecutor asked defendant whether officers were lying, and defendant did not object; court held that, even assuming prosecutor's question was improper, error was not fundamental).

NOTE: Impeachment and rehabilitation evidence showing a witness's bias, prejudice, or interest is admissible under Rule 401; cases are annotated under Rule 401 Impeachment Cases.

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Rule 609. Impeachment by Evidence of a Criminal Conviction.

(a) In General. The following rules apply to attacking a witness's character for truthfulness by evidence of a criminal conviction:

(1) for a crime that, in the convicting jurisdiction, was punishable by death or by imprisonment for more than 1 year, the evidence:

(A) must be admitted, subject to Rule 403, in a civil case or in a criminal case in which the witness is not a defendant; and

(B) must be admitted in a criminal case in which the witness is a defendant, if the probative value of the evidence outweighs its prejudicial effect to that defendant; and

(2) for any crime regardless of the punishment, the evidence must be admitted if the court can readily determine that establishing the elements of the crime required proving—or the witness's admitting—a dishonest act or false statement.

(b) Limit on Using the Evidence After 10 Years. This subsection (b) applies if more than 10 years have passed since the witness's conviction or release from confinement for it, whichever is later. Evidence of the conviction is admissible only if:

(1) its probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect; and

(2) the proponent gives an adverse party reasonable written notice of the intent to use it so that the party has a fair opportunity to contest its use.

(c) Effect of a Pardon, Annulment, or Certificate of Rehabilitation. Evidence of a conviction is not admissible if:

(1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding that the person has been rehabilitated, and the person has not been convicted of a later crime punishable by death or by imprisonment for more than 1 year; or

(2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

(d) Juvenile Adjudications. Evidence of a juvenile adjudication is admissible only if:

(1) it is offered in a criminal case;

(2) the adjudication was of a witness other than the defendant;

(3) an adult's conviction for that offense would be admissible to attack the adult's credibility; and

(4) admitting the evidence is necessary to fairly determine guilt or innocence.

(e) Pendency of an Appeal. A conviction that satisfies this rule is admissible even if an appeal is pending. Evidence of the pendency is also admissible.

Comment to 2012 Amendment

This rule has been amended to conform to Federal Rule of Evidence 609, including changing "credibility" to "character for truthfulness" in subsection (a) and adding language to the last clause of subdivision (a)(2) to clarify that this evidence must be admitted "if the court can readily determine that establishing the elements of the crime required proving—or the witness's admitting—a dishonest act or false statement."

Additionally, the language of Rule 609 has been amended to conform to the federal restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent in the restyling to change any result in any ruling on evidence admissibility.

Comment to Original 1977 Rule

Subsection (d) is contrary to the provisions of A.R.S. § 8–207, but in criminal cases due process may require that the fact of a juvenile adjudication be admitted to show the existence of possible bias and prejudice. *Davis v. Alaska*, 415 U.S. 308 (1974). The fact of a juvenile delinquency adjudication may not be used to impeach the general credibility of a witness. The admission of such evidence may be necessary to meet due process standards.

Cases**Paragraph (a) — General rule.**

609.a.010 The constitutional right of the defendant to cross-examine witnesses does not give the defendant the right to cross-examine on irrelevant matters, thus prohibiting a defendant from introducing evidence of a witness’s prior conviction may not necessarily deny the defendant the constitutional right to confront (impeach) the witness.

State v. Winegardner, 242 Ariz. 430, 397 P.3d 363, ¶¶ 19–23 (Ct. App. 2017) (defendant sought to impeach victim-witness (who was 15 years old at time of offense in 2012) with evidence that she was convicted of shoplifting in 2015; court held evidence of conviction was not necessary to reveal any possible biases, prejudices, or ulterior motives behind victim’s testimony, thus precluding defendant from impeaching victim did not violate defendant’s due process and confrontation clause rights), *vac’d*, 243 Ariz. 482, 413 P.3d 683 (2018).

Paragraph (a)(1) — Impeachment with a felony conviction.

609.a.1.010 Because this Rule provides that a trial court may admit evidence of a prior conviction “if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect,” the party seeking to impeach has the burden of establishing the probative value of the prior conviction and that its probative value outweighs the prejudicial effect; this is in contrast to Rule 403, which provides a trial court may exclude relevant evidence “if its probative value is substantially outweighed by the danger of unfair prejudice,” and thus places on the party seeking to exclude relevant evidence the burden of proving that the prejudicial effect outweighs the probative value.

State v. Beasley, 205 Ariz. 334, 70 P.3d 463, ¶ 21 (Ct. App. 2003) (court held, “under Rule 609, the defendant is not required to demonstrate that the prejudice of the impeachment is ‘unfair’ or that the prejudice of the impeachment ‘substantially’ outweighs its probative value”).

609.a.1.020 A felony has probative value on the issue of the credibility of the witness because a major crime entails such an injury to and disregard of the rights of other persons that it can reasonably be expected that the witness will be untruthful if it is to his or her advantage.

State v. Green, 200 Ariz. 496, 29 P.3d 271, ¶ 8 (2001) (trial court admitted 12-year-old felony under Rule 609(b); court held trial court erred in considering only one factor (centrality of credibility issue) and not considering other factors).

Ritchie v. Krasner, 221 Ariz. 288, 211 P.3d 1272, ¶¶ 46 (Ct App. 2009) (defendant contended trial court abused discretion in precluding evidence of plaintiff’s prior felony conviction; court noted that felony conviction was admissible only to attack plaintiff’s credibility as witness, and only time plaintiff testified was at deposition; because defendant failed to raise timely plaintiff’s conviction during deposition, trial court did not abuse discretion in excluding evidence of plaintiff’s felony conviction at trial).

State v. Hernandez, 191 Ariz. 553, 959 P.2d 810, ¶ 22 (Ct. App. 1998) (court held conviction for crime defendant committed after the crime for which he was on trial was admissible for impeachment).

609.a.1.025 A witness may be impeached with a prior conviction punishable by death or imprisonment in excess of 1 year.

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State ex rel. Romley v. Martin (Landeros), 205 Ariz. 279, 69 P.3d 1000, ¶¶ 1–24 (2003) (court stated that, while *State v. Christian* and *State v. Thues* make plain Proposition 200 offenses are felonies, Rule 609 does not involve technical definition of felony, but instead uses punishment in excess of 1 year; because person could not be imprisoned in excess of 1 year for first or second Proposition 200 offense, person may not be impeached with evidence of conviction of first or second Prop 200 offense).

State v. Hatch, 225 Ariz. 409, 239 P.3d 432, ¶¶ 6–14 (Ct. App. 2010) (although Proposition 200 provided that person with first or second conviction of drug offense had to be placed on probation and thus could not be imprisoned in excess of 1 year, Proposition 302 provided that trial court could sentence person to prison if they failed to comply with certain conditions of probation, thus trial court properly allowed defendant to be impeached with conviction for possession of drug paraphernalia).

609.a.1.035 In determining whether to admit a prior conviction for impeachment purposes, the trial court should consider such factors as the nature of the prior offense, the similarity of the prior offense and the present charged offense, the age of the witness, the remoteness of the conviction, the length of the prior imprisonment, the witness’s conduct since the prior offense, the importance of the witness’s testimony, and the centrality of credibility issue.

State v. Green, 200 Ariz. 496, 29 P.3d 271, ¶ 12 (2001) (trial court admitted 12-year-old felony under Rule 609(b); court held trial court erred in considering only one factor (centrality of credibility issue) and not considering other factors).

609.a.1.080 Impeaching a witness with a prior felony conviction is limited to showing the fact of the conviction, the name of the crime, the place, and the date.

State v. Dunlap, 187 Ariz. 441, 930 P.2d 518 (Ct. App. 1996) (once witness stated he had been convicted of vehicular manslaughter, prosecutor erred in asking witness whether it was true that he was drunk, ran red light, and killed somebody).

State v. Doody, 187 Ariz. 363, 930 P.2d 440 (Ct. App. 1996) (because facts of witness’s prior crime were not relevant to any issue in case, trial court properly precluded defendant from inquiring into details of prior crime).

609.a.1.170 Evidence of multiple felony convictions is not necessarily unfairly prejudicial.

State v. Hernandez, 191 Ariz. 553, 959 P.2d 810, ¶¶ 27–32 (Ct. App. 1998) (court rejected defendant’s contention that multiple convictions for offenses committed on the same occasion should be treated as one conviction for impeachment).

609.a.1.180 The trial court has discretion to impose limits in order to minimize prejudice, such as “sanitizing” the conviction by not disclosing the nature of the prior conviction.

State v. Montaña, 204 Ariz. 413, 65 P.3d 61, ¶¶ 64–66 (2003) (witness who was prison inmate had prior convictions for child pornography and attempted child molestation for crimes committed approximately 1 to 2 years prior to defendant’s trial; trial court admitted fact of prior convictions, but precluded details of prior convictions; defendant contended nature of prior convictions was relevant because it gave witness motive to testify, that is, if other inmates found out witness was child molester, they would have killed him, thus witness made up testimony to get out of general population; court held trial court did not abuse discretion in precluding details of prior conviction, noting defendant was still able to bring out fact of prior convictions, but did not address defendant’s contention that nature of prior conviction had own independent relevance because it gave witness motive to testify).

State v. Todd, 244 Ariz. 374, 418 P.3d 1147, ¶¶ 9–10 (Ct. App. 2018) (defendant contended trial court erred in sanitizing witness’s prior conviction to preclude fact it was for receiving stolen property; court held that, even assuming arguendo trial court is barred from sanitizing prior conviction that involves dishonesty, receiving stolen property is not such offense (phrase “dishonesty or false statement” should be construed narrowly to include only those crimes involving some element of deceit, untruth-

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fulness, or falsification, and not crimes such as theft or robbery); and that, because witness's prior convictions did not involve dishonesty or false statements and because witness's prior felony history "was discussed at length at trial," trial court did not err by sanitizing conviction).

State v. Beasley, 205 Ariz. 334, 70 P.3d 463, ¶¶ 16–26 (Ct. App. 2003) (defendant charged with aggravated assault and attempted murder as result of trying to escape from police; trial court ruled state could impeach defendant with prior convictions for armed robbery, two counts of aggravated assault on police officer, resisting arrest, and two other counts of aggravated assault and allowed state to disclose nature of prior convictions; court held trial court erred in not balancing prejudicial effect of nature of prior convictions against probative value of nature of prior convictions, but error was harmless).

State v. Cox, 201 Ariz. 464, 37 P.3d 437, ¶¶ 2–6 (Ct. App. 2002) (trial court allowed victim impeached with evidence of prior conviction, but did not allow evidence of specific nature of prior offense; defendant contended evidence he should have been allowed to show prior conviction was for armed robbery to show victim was still gang member; because victim admitted he was gang member, trial court did not abuse discretion in precluding nature of prior conviction).

609.a.1.185 In determining whether to disclose the nature of the prior conviction, the trial court must determine the extent to which the nature of the prior conviction has probative value, and then balance that probative value against the prejudice that would result if the nature of the prior conviction were disclosed to the jurors.

State v. Montañño, 204 Ariz. 413, 65 P.3d 61, ¶¶ 64–66 (2003) (prison inmate witness had prior convictions for child pornography and attempted child molestation; trial court admitted fact of prior convictions, but precluded details; defendant contended nature of prior convictions was relevant because it gave witness motive to testify: if other inmates found out witness was child molester, they would have killed him, thus he made up testimony to get out of general population; court held trial court did not abuse discretion in precluding details of prior conviction, noting that defendant was still able to bring out fact of prior convictions, but did not address defendant's contention that nature of prior conviction had own independent relevance because it gave witness motive to testify).

State v. Beasley, 205 Ariz. 334, 70 P.3d 463, ¶¶ 16–26 (Ct. App. 2003) (defendant charged with aggravated assault and attempted murder as result of trying to escape from police; trial court ruled state could impeach defendant with prior convictions for armed robbery, two counts of aggravated assault on police officer, resisting arrest, and two other counts of aggravated assault and allowed state to disclose nature of prior convictions; court held trial court erred in not balancing prejudicial effect of nature of prior convictions against probative value of nature of prior convictions, but that error was harmless).

609.a.1.187 A trial court should sparingly admit evidence of prior convictions when the prior convictions are similar to the charged offense, thus in an appropriate case, the trial court may reduce the risk of prejudice by admitting the fact of the prior conviction without disclosing the nature of the crime.

State v. Bolton, 182 Ariz. 290, 302–03, 896 P.2d 830, 842–43 (1995) (defendant charged with kidnapping, burglary, and first-degree felony murder; trial court ruled state could impeach defendant with prior convictions for kidnapping, sexual abuse, possession of burglary tools, and battery; defendant testified and admitted prior convictions, and also admitted he had committed several other crimes for which he had never been charged, including theft and murder; court stated it saw "no reason to make a definitive ruling on the merits of his claim because, wholly apart from the prior convictions, defendant testified that he was a thief and had committed a murder other than the murder for which he was charged," thus any error harmless, but did include advise about sparingly admitting evidence of similar prior convictions).

State v. Beasley, 205 Ariz. 334, 70 P.3d 463, ¶¶ 22–25 (Ct. App. 2003) (defendant charged with aggravated assault and attempted murder as result of trying to escape from police; trial court ruled state could impeach defendant with prior convictions for armed robbery, two counts of aggravated assault on

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police officer, resisting arrest, and two other counts of aggravated assault and allowed state to disclose nature of prior convictions; court held trial court erred in not balancing prejudicial effect of nature of prior convictions against probative value of nature of prior convictions, but that error was harmless).

609.a.1.220 Once trial court rules that evidence of a prior conviction is admissible, the defendant does not waive this issue by testifying and admitting the prior conviction; however, if the defendant does not testify, the defendant may not question on appeal the trial court's ruling.

State v. Smyers, 207 Ariz. 314, 86 P.3d 370, ¶¶ 5–15 (2004) (trial court ruled that defendant could be impeached with his prior conviction for attempted child abuse, and would allow in evidence (1) name of offense, (2) court, (3) date of offense, and (4) whether defendant was assisted by counsel; trial court would not allow in evidence (1) class of offense or (2) facts of offense; because defendant chose not to testify, defendant waived on appeal correctness of trial court's ruling).

609.a.1.230 Once the trial court rules the probative value outweighs the prejudicial effect, if the defendant does not testify, the trial court does not have to re-weigh the probative value against the prejudicial effect.

State v. Hernandez, 191 Ariz. 553, 959 P.2d 810, ¶¶ 20–26 (Ct. App. 1998) (court rejected defendant's contention that, once it became apparent defendant would not testify, if trial court had re-weighed probative value against prejudicial effect, it would have precluded impeachment).

Paragraph (a)(2) — Impeachment with conviction of crime involving dishonest act or false statement.

609.a.2.010 The phrase “dishonest act or false statement” should be construed narrowly to include only those crimes that involve deceit, untruthfulness, or falsification, thus a misdemeanor or felony conviction is admissible under this section only if the elements of the crime required proving, or the witness's admitting, some element of deceit, untruthfulness, or falsification.

State v. Winegardner, 243 Ariz. 482, 413 P.3d 683, ¶¶ 6–17 (2018) (court held that elements of shoplifting do not necessarily involve deceit, untruthfulness, or falsification).

Frederickson v. Superior Ct., 187 Ariz. 273, 928 P.2d 697 (Ct. App. 1996) (holds that leaving scene of accident is crime of moral turpitude in determining whether defendant was entitled to jury trial, but cites cases that made this holding under Rule 609).

609.a.2.020 When the legal elements of an offense do not necessarily involve a dishonest act or false statement, the factual basis for the prior conviction may warrant admission of the conviction for impeachment purposes, in which case, the party seeking admission of the prior conviction bears the burden of establishing the factual basis for its admission, which may come from such sources as the indictment, a statement of admitted facts, or jury instructions, but this rule does not permit a “trial within a trial” delving into the factual circumstances of the conviction by scouring the record or calling witnesses.

State v. Winegardner, 243 Ariz. 482, 413 P.3d 683, ¶¶ 19–24 (2018) (because defendant provided trial court with no information showing shoplifting conviction involved dishonest act or false statement, trial court did not abuse its discretion in precluding evidence of shoplifting conviction).

State v. Duarte, 246 Ariz. 338, 438 P.3d 707, ¶¶ 20–29 (Ct. App. 2018) (defendant contended trial court erred in precluding him from impeaching victim with her felony conviction for attempted first-degree hindering prosecution; court held offense of hindering prosecution can occur in multiple ways, not all of which necessarily involve “a dishonest act or false statement,” thus it was not *per se* admissible under Rule 609(a)(2); further defendant did not provide trial court with any documentation showing that victim's conviction in particular was one involving “a dishonest act or false statement”; trial court therefore did not err in precluding impeachment).

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Paragraph (b) — Time limit.

609.b.005 In determining whether to admit a prior conviction for impeachment purposes, the trial court should consider such factors as the nature of the prior offense, the similarity of the prior offense and the present charged offense, the age of the witness, the remoteness of the conviction, the length of the prior imprisonment, the witness's conduct since the prior offense, the importance of the witness's testimony, and the centrality of credibility issue.

State v. Green, 200 Ariz. 496, 29 P.3d 271, ¶¶ 12–15 (2001) (trial court admitted 12-year-old felony under Rule 609(b); court held trial court erred in considering only one factor (centrality of credibility issue) and not considering other factors).

State v. Todd, 244 Ariz. 374, 418 P.3d 1147, ¶¶ 5–7 (Ct. App. 2018) (defendant was found guilty of knowingly discharging firearm at residential structure, intentionally discharging firearm from motor vehicle at an occupied structure, and aggravated assault; defendant contended trial court should have allowed her to impeach witness's testimony with evidence of his then-15-year-old conviction for trafficking methamphetamine; court held evidence of witness's 15-year-old conviction did not meet elevated requirements of Rule 609(b): (1) offense was of low probative value because it occurred over 10 years before witness testified; (2) record did not contain specific facts or circumstances indicating probative value of that conviction substantially outweighs its prejudicial effect; and (3) record did not indicate defendant served state with written notice of intent to impeach witness with that conviction as required; thus trial court properly precluded impeachment).

609.b.010 Because convictions that are remote in time have less probative value on the issue of credibility, when it is more than 10 years since date of conviction or release from confinement, evidence of a prior conviction is admissible only if the probative value *substantially* outweighs the prejudicial effect.

State v. Green, 200 Ariz. 496, 29 P.3d 271, ¶ 9 (2001) (trial court admitted 12-year-old felony under Rule 609(b); court held trial court erred in considering only one factor (centrality of credibility issue) and not considering other factors).

State v. Waller, 235 Ariz. 479, 333 P.3d 806, ¶¶ 37–40 (Ct. App. 2014) (trial court allowed defendant to impeach victim with 2003 conviction, but precluded impeachment with two 1980 convictions; because defendant never asked trial court to make balancing findings nor objected when trial court did not make specific findings, defendant waived any claim on appeal that trial court erred by not making findings; moreover, it was clear from record that attorneys argued probative value and prejudicial effect to trial court, and trial court considered those arguments).

609.b.020 Before the trial court may admit for impeachment evidence of a conviction more than 10 years old, it must make a finding on the record that the probative value *substantially* outweighs the prejudicial effect, and must state the specific facts and circumstances that support this determination.

State v. Green, 200 Ariz. 496, 29 P.3d 271, ¶ 9 (2001) (trial court admitted 12-year-old felony under Rule 609(b); court held trial court erred in considering only one factor (centrality of credibility issue) and not considering other factors).

609.b.030 Probation is not confinement, thus the time spent on probation does not extend the time for measuring the 10-year period.

State v. Dunlap, 187 Ariz. 441, 930 P.2d 518 (Ct. App. 1996) (trial court erred in measuring 10-year period from expiration of probation).

609.b.040 Before the trial court may admit for impeachment evidence of a conviction more than 10 years old, the proponent must give the adverse party reasonable written notice of the intent to use it.

State v. Duarte, 246 Ariz. 338, 438 P.3d 707, ¶ 31 (Ct. App. 2018) (court held trial court did not err in concluding written notice given 4 days before trial was not reasonable).

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Paragraph (d) — Juvenile adjudications.

609.d.010 Evidence of a juvenile adjudication is generally not admissible, but the trial court in a criminal case may admit evidence of a juvenile adjudication of a witness other than the accused if admission is necessary for a fair determination of guilt or innocence of the accused.

In re Anthony H., 196 Ariz. 200, 994 P.2d 407, ¶¶ 8–11 (Ct. App. 1999) (trial court erred in admitting evidence of juvenile’s juvenile adjudication, which state used to impeach juvenile’s credibility).

609.d.040 This rule precluding admission of juvenile adjudications does not preclude admission of evidence of juvenile arrests, provided such evidence is admitted for a proper purpose.

State v. Corona, 188 Ariz. 85, 932 P.2d 1356 (Ct. App. 1997) (evidence of defendant’s other arrests was admissible to rebut suggestion that officers improperly recorded defendant’s admission of gang membership).

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Rule 610. Religious Beliefs or Opinions.

Evidence of a witness's religious beliefs or opinions is not admissible to attack or support the witness's credibility.

Comment to 2012 Amendment

The language of Rule 610 has been amended to conform to the federal restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Cases

610.010 Evidence of a witness's religious beliefs may not be introduced to show an effect on the witness's credibility, and introduction of such evidence may be fundamental error.

State v. Towery, 186 Ariz. 168, 920 P.2d 290 (1996) (defendant claimed that evidence of witness's satanic beliefs might have persuaded jurors to believe that witness, rather than defendant, killed victim; once trial court sustained objection, defendant failed to make offer of proof of witness's satanic beliefs, so on record presented, evidence appeared only to go witness's credibility, thus trial court properly precluded it).

State v. Rankovich, 159 Ariz. 116, 765 P.2d 518 (1988) (evidence about person's ethnic background or religious beliefs is generally irrelevant and thus introduction of such evidence is generally improper; however, in light of overwhelming evidence of defendant's guilt, evidence that defendant was a Russian Jew was not fundamental error).

State v. Thomas, 130 Ariz. 432, 636 P.2d 1214 (1981) (error to argue that victim's religious upbringing made it more likely she would tell truth).

State v. Marvin, 124 Ariz. 555, 606 P.2d 406 (1980) (trial court properly excluded evidence of defendant's religious beliefs, intended to bolster credibility for his theory of provocation and lack of premeditation in killing wife's lover).

610.020 Evidence of a witness's religious beliefs is admissible if offered for some relevant purpose other than to show credibility.

State v. Towery, 186 Ariz. 168, 920 P.2d 290 (1996) (defendant claimed that evidence of witness's satanic beliefs might have persuaded jurors to believe that witness, rather than defendant, killed victim; once trial court sustained objection, defendant failed to make offer of proof of witness's satanic beliefs, so on record presented, evidence appeared only to go witness's credibility, thus trial court properly precluded it).

State v. West, 168 Ariz. 292, 812 P.2d 1110 (Ct. App. 1991) (because defendant first introduced subject of his religious beliefs, and because prosecutor's cross-examination was limited to exploring defendant's belief in rightfulness of his conduct, trial court did not err in admitting testimony).

State v. Stone, 151 Ariz. 455, 728 P.2d 674 (Ct. App. 1986) (witness's religious affiliation enabled her to identify garments attacker was wearing and explained why she did not tell attacker's wife what had happened when victim telephoned wife after attack).

State v. Crum, 150 Ariz. 244, 722 P.2d 971 (Ct. App. 1986) (evidence defendant was known as "Father Tim" introduced to show identity; questioning victims about their service as altar boys introduced to show defendant's modus operandi of developing relationship with victims so he could later seduce them; evidence of relationship between defendant and church introduced to determine whether clerical privilege applied).

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610.030 When one party “opens the door” by questioning a witness about religious matters, the other party may cross-examine that witness about those religious matters.

State v. West, 168 Ariz. 292, 812 P.2d 1110 (Ct. App. 1991) (because defendant first introduced subject of his religious beliefs, and because prosecutor’s cross-examination was limited to exploring defendant’s belief in rightfulness of his conduct, trial court did not err in admitting testimony).

610.040 It is permissible to inquire into religious training to determine whether the witness knew of the wrongfulness of the acts.

State v. West, 168 Ariz. 292, 812 P.2d 1110 (Ct. App. 1991) (because defendant claimed that teachings of Bible justified his conduct toward wife, prosecutor permitted to question him about knowledge of Bible and about what kind of conduct he thought it justified).

610.050 It is permissible to inquire into the witness’s religious beliefs when the witness uses religion to justify the conduct.

State v. West, 168 Ariz. 292, 812 P.2d 1110 (Ct. App. 1991) (because defendant claimed that teachings of Bible justified his conduct toward wife, prosecutor permitted to question him about knowledge of Bible and about what kind of conduct he thought it justified).

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Rule 611. Mode and Order of Examining Witnesses and Presenting Evidence.

(a) Control by the Court; Purposes. The court should exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to:

- (1) make those procedures effective for determining the truth;
- (2) avoid wasting time; and
- (3) protect witnesses from harassment or undue embarrassment.

(b) Scope of cross-examination. A witness may be cross-examined on any relevant matter.

(c) Leading Questions. Leading questions should not be used on direct examination except as necessary to develop the witness's testimony. Ordinarily, the court should allow leading questions:

- (1) on cross-examination; and
- (2) when a party calls a hostile witness, an adverse party, or a witness identified with an adverse party.

Comment to 2012 Amendment

This rule has been amended to conform to Federal Rule of Evidence 611, except for subsection (b), which has not been changed.

Additionally, the language of subsections (a) and (c) has been amended to conform to the federal restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent in the restyling to change any result in any ruling on evidence admissibility.

The 2012 amendment of Rule 611(a) is not intended to diminish a trial court's ability to impose reasonable time limits on trial proceedings, which is otherwise provided for by rules of procedure. Similarly, the 2012 amendment of Rule 611(c) is not intended to change existing practice under which a witness called on direct examination and interrogated by leading questions may be interrogated by leading questions on behalf of the adverse party as well.

Comment to Rule 611(a), 1995 Amendment

Following are suggested procedures for effective document control:

- (1) The trial judge should become involved as soon as possible, and no later than the pretrial conference, in controlling the number of documents to be used at trial.
- (2) For purposes of trial, only one number should be applied to a document whenever referred to.
- (3) Copies of key trial exhibits should be provided to the jurors for temporary viewing or for keeping in juror notebooks.
- (4) Exhibits with text should and, on order of the court, shall be highlighted to direct jurors' attention to important language. Where important to an understanding of the document, that language should be explained during the course of trial.
- (5) At the close of evidence in a trial involving numerous exhibits, the trial judge shall ensure that a simple and clear retrieval system, e.g., an index, is provided to the jurors to assist them in finding exhibits during deliberations.

Comment to Original 1977 Rule

The last sentence of (c) changes the Arizona Supreme Court's holding in *J. & B. Motors, Inc. v. Margolis*, 75 Ariz. 392, 257 P.2d 588 (1953).

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611.010 An argumentative question is a question that seeks no factual testimony, but requires instead that the witness acquiesce in inferences drawn by counsel from prior testimony.

State v. Lynch, 238 Ariz. 84, 357 P.3d 119, ¶ 24 (2015) (although cross-examination was argumentative, and trial judge could have sustained objection on that basis, defense had elicited from expert witness testimony that defendant could be safely housed in prison, thus questions about other offenders who had escaped from prison was relevant to whether defendant could be housed safely, so cross-examination was relevant rebuttal to that testimony).

State v. Bolton, 182 Ariz. 290, 307–08, 896 P.2d 830, 847–48 (1995) (prosecutor asked defendant following questions: “And you expect the jury to believe this story?”; “[W]e don’t have any information with which to charge you with murder, do we?”; “But you thought you would take a gun and a shovel out into the desert to kill somebody about whom you knew virtually nothing?”; court stated these may have been argumentative questions, but not so egregious that it permeated entire trial and probably affected outcome).

Gosewisch v. American Honda Motor Co., 153 Ariz. 389, 399, 737 P.2d 365, 375 (1985) (plaintiff asked defendant’s representative following questions: “Do you know how many people have been crippled or killed with a forward flip of these vehicles between 1970 and 1980?” and “Have you or Honda made any effort to find out how many people are being injured in the field with your invention?”; court stated thrust and implication of both questions was that defendant loosed upon public vehicle that was maiming and killing people, and to that extent, questions were argumentative, thus trial court did not err in sustaining objection to those questions).

611.020 A compound question is a question that contains two or more questions, and is not permissible because it is likely to invite an ambiguous answer.

State v. Moody, 208 Ariz. 424, 94 P.3d 1119, ¶¶ 108–10 (2004) (defendant’s attorney asked state’s expert whether defendant had been “called a malingeringer, which is a medical term for liar,” to which expert responded, “Yes”; because this was compound question, it was unclear whether expert’s response was, “Yes, defendant had been called a malingeringer” or “Yes, malingeringer is a medical term for liar”; defendant thus was not entitled to relief on claim that expert erred in equating “malingeringer” with “liar”).

State v. Fodor, 179 Ariz. 442, 453, 880 P.2d 662, 673 (Ct. App. 1994) (at grand jury, defendant answered “no” to following question: “Has anybody ever suggested that you give that type of evidence [letters or documents that you or anyone else wrote to Jim Robison] to [attorney] so that the state could not get it?”; because defendant had given this type of evidence to attorney, state charged defendant with perjury; court held this was compound question, and although answer of “no” to first part was untrue, answer of “no” to second part was true, thus answer could not support conviction for perjury).

611.030 A leading question is one that suggests an answer, not one whose answer is obvious.

State v. McKinney, 185 Ariz. 567, 575, 917 P.2d 1214, 1222 (1996) (after prosecutor received negative response to question whether witness had seen anything in trunk of car, asking, “Did you see at any time Mike Hedlund’s rifle?” was not leading question).

State v. McKinney, 185 Ariz. 567, 575, 917 P.2d 1214, 1222 (1996) (asking witness, “[D]id [defendant] appear to be slightly more aggressive towards you or Chris?” was not leading).

State v. Agnew, 132 Ariz. 567, 577, 647 P.2d 1165, 1175 (Ct. App. 1982) (court stated that “[T]he cat was black, wasn’t it?” was leading question; court held that “Had you known that the trust was not insured would you have invested?” was not leading question).

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611.035 Once a party has obtained certain information from one witness by use of open-ended questions, it is not error to ask other witness leading questions that elicit the same information.

State v. Garcia, 141 Ariz. 97, 101, 685 P.2d 734, 738 (Ct. App. 1984) (after witness testified that he thought iron bar could hurt him, no error in asking another witness, “[D]id you believe [the bar] to be readily capable of causing either your death or the other officers’ death?” and “Did you also believe . . . it could readily cause serious physical injury?”).

611.040 Only the party asking a question has the right to object on the grounds the answer is not responsive to the question.

Moschetti v. City of Tucson, 9 Ariz. App. 108, 113, 449 P.2d 945, 950 (1969) (testimony about source of funds to pay condemnation award was irrelevant, but this came in non-responsive answer to appellant’s question, and only appellant had right to object on that basis; once this evidence was before jurors, appellee had right to introduce evidence to rebut it).

611.050 Although Arizona law does not explicitly prohibit speaking objections, Rule 103(d) provides that, to the extent practicable, the court must conduct a jury trial so that inadmissible evidence is not suggested to the jurors by any means.

State v. Lynch, 238 Ariz. 84, 357 P.3d 119, ¶¶ 16–17 (2015) (defendant did not identify, and court did not find, any inadmissible evidence state incorporated into its speaking objections; further, defendant did not object at trial and failed to demonstrate fundamental error).

Paragraph (a) — Control by the court.

611.a.010 The use of the term “shall” in Rule 611(a) means that the trial court should not be merely a passive observer in the trial process, but instead has an affirmative duty to conduct the trial in such a way as to carry out the goals of the Rules of Evidence.

State v. Bible, 175 Ariz. 549, 595, 858 P.2d 1152, 1198 (1993) (court noted trial judges are not merely “referees at prize fights,” but are instead “functionaries of justice,” and thus have authority to prevent repetitive, irrelevant, or argumentative questioning, even when other party does not object).

Pool v. Superior Ct., 139 Ariz. 98, 103–04, 677 P.2d 261, 266–67 (1984) (court held trial court properly controlled “verbal guerrilla warfare” exhibited by attorneys).

State v. Granados, 235 Ariz. 321, 332 P.3d 68, ¶¶ 23–25 (Ct. App. 2014) (court held trial court’s sua sponte objections during defendant’s testimony were proper exercise of trial court’s duty to control courtroom and did not give appearance of bias).

611.a.020 A trial court has discretion to determine the manner of the proceedings, the manner of questioning, and the order of presentation of evidence.

State v. Goudeau, 239 Ariz. 421, 372 P.3d 945, ¶¶ 86–95 (2016) (defendant was charged in 82 counts with committing 74 various felonies; court held trial court did not abuse discretion in allowing separate opening statements before each of 13 “chapters” of charged conduct).

Gamboa v. Metzler, 223 Ariz. 399, 224 P.3d 215, ¶¶ 12–18 (Ct. App. 2010) (because of scheduling problems, parties agreed witness E would testify from 1:00 p.m. to 1:30 p.m., and then parties would have from 1:30 p.m. to 4:30 p.m. for witness A; Plaintiff however did not finish with witness E until 2:41 p.m.; Defendant examined witness A from 3:04 p.m. to 4:00 p.m., and Plaintiff began cross-examination at 4:12 p.m., with a recess from 4:29 p.m. to 4:38 p.m., and continued until 5:04 p.m. when trial court stopped proceedings; Plaintiff objected to trial court’s “limiting [his] cross-examination,” but did not request to resume cross-examination next day; next morning, trial court considered Plaintiff’s objection, and found Plaintiff’s attorney was responsible for scheduling problems; trial court did allow Plaintiff’s attorney to attempt to contact witness A, but Plaintiff’s attorney could not reach witness A; trial court concluded it would not keep jurors waiting any longer and allowed them to begin

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their deliberations; Plaintiff contended trial court violated his due process rights by not allowing sufficient time to cross-examine witness A; court concluded time limits imposed were not unreasonable, Plaintiff had approximately 43 minutes to cross-examine witness A, and Plaintiff did not make offer of proof of what he would have been able to accomplish with more cross-examination, and thus held Plaintiff failed to show how he was harmed by trial court's time limitations).

State v. Wassenaar, 215 Ariz. 565, 161 P.3d 608, ¶¶ 26–33 (Ct. App. 2007) (defendant contended that requiring him to testify by responding to questions asked by advisory counsel, rather than by narrative testimony or by asking himself questions, made it appear he was not in control of his own defense and that advisory counsel was actually representing him; court held trial court has broad discretion in management of manner in which trial will be conducted, and this procedure did not violate defendant's right of self-representation).

611.a.090 The trial court may prohibit questions and may enter such orders as are necessary to protect a witness from harassment or undue embarrassment.

State v. Oliver, 158 Ariz. 22, 26–29, 760 P.2d 1071, 1075–78 (1988) (because child molestation victim may be even more adversely affected by unwarranted and unreasonable inquiry into largely collateral and irrelevant evidence than adult victim, trial court should try to protect victim from unwarranted and unreasonably intrusive cross-examination by requiring counsel to demonstrate independent knowledge of sexual matters, without producing details of victim's previous sexual experience).

611.a.095 Before a party may introduce evidence about the witness's mental condition in an attempt to impeach the witness's ability to perceive, remember, or relate, the party must make an offer of proof of evidence sufficient for the jurors to find that the witness's mental condition did have an effect on the witness's ability to perceive, remember, or relate.

State v. Delahanty, 226 Ariz. 502, 250 P.3d 1131, ¶¶ 13–21 (2011) (defendant contended trial court abused discretion in precluding evidence that witness suffered from Schizophrenia; although past records noted witness had been diagnosed with Schizophrenia, defendant's expert was unable to make diagnosis of Schizophrenia, thus trial court did not abuse discretion in precluding this evidence).

State v. Soto-Fong, 187 Ariz. 186, 197–98, 928 P.2d 610, 621–22 (1996) (because defendant's offer of proof failed to show how officer's terminal illness, use of prescription medicine, or mood in any way affected his testimony, trial court properly precluded this evidence).

State v. Dumaine, 162 Ariz. 392, 397–98, 406, 783 P.2d 1184, 1189–90, 1198 (1989) (defendant presented insufficient evidence to show mental condition affected witness's ability to perceive, remember, and relate, thus prosecutor did not commit discovery violation by failing to disclose witness's mental condition).

State v. Walton, 159 Ariz. 571, 581–82, 769 P.2d 1017, 1027–28 (1989) (state's witness testified about defendant's admissions; defendant sought to introduce evidence of witness's history of drug use, but made no offer of proof beyond bare speculation; state sought to exclude evidence of witness's drug use beyond time he heard defendant's admission; court stated trial court does not abuse discretion when proponent fails to make offer of proof that witness's perception or memory was affected by condition; court held that, because defendant's offer of proof failed to show drug use did impair witness's memory or perception, trial court did not abuse discretion in granting state's motion).

State v. Zuck, 134 Ariz. 509, 513, 658 P.2d 162, 662 (1982) (evidence of insanity admissible if it affected witness's ability to perceive at time of event, relate at time of testimony, or remember in meantime; court stated, "We hold that before psychiatric history of a witness may be admitted to discredit him on cross-examination, the proponent of the evidence must make an offer of proof showing how it affects the witness's ability to observe and relate the matters to which he testifies.").

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Mulbern v. City of Scottsdale, 165 Ariz. 395, 397–98, 799 P.2d 15, 17–18 (Ct. App. 1990) (trial court granted defendant’s motion to preclude evidence of officer’s drug and alcohol use; because plaintiff did not offer any evidence officer was under influence of alcohol or drugs at time of shooting, trial court properly precluded evidence of officer’s alcohol and drug use).

611.a.140 The trial court has discretion to allow a party to recall a witness.

State v. Hill, 174 Ariz. 313, 324, 848 P.2d 1375, 1386 (1993) (after trial court dismissed witness, trial court did not abuse discretion in allowing state to recall witness to identify photograph and physical object before offering them in evidence).

State v. Johnson, 183 Ariz. 623, 635, 905 P.2d 1002, 1014 (Ct. App. 1995) (during deliberations, jurors sent note asking how photographs in photographic lineup were mounted and whether defendant had limp at time of attack; over defendant’s objection, trial court recalled detective as “court’s witness,” told jurors it was doing so because detective was only one who could answer jurors’ question, asked detective only questions jurors had asked, and gave both attorneys opportunity to cross-examine detective, which defendant declined; court held this was not an abuse of trial court’s discretion and procedure did not prejudice defendant), *approv’d on other grounds*, 186 Ariz. 329, 922 P.2d 294 (1996).

611.a.150 The trial court has broad discretion to allow, or refuse to allow, a party to reopen its case.

State v. Dickens, 187 Ariz. 1, 12–13, 926 P.2d 468, 479–80 (1996) (once state had rested, one of its witnesses who previously had refused to testify now agreed to testify; trial court did not abuse discretion in allowing state to reopen when testimony did not come as surprise to defendant or prejudice his ability to respond to that evidence).

State v. Patterson, 203 Ariz. 513, 56 P.3d 1097, ¶¶ 5–12 (Ct. App. 2002) (defendant charged with murder and drive-by shooting; direction of travel, location of victims, and location of witness all were relevant; jurors had received as exhibits two aerial photographs, computer generated graphics, and hand drawings of area; during deliberations, jurors asked for map of area; defendant objected, but trial court found no prejudice to defendant, and so admitted map; court held, even though jurors did not say they were deadlocked, trial court did not abuse discretion in reopening case and admitting map for jurors, even though they had begun deliberations).

State v. Doody, 187 Ariz. 363, 378, 930 P.2d 440, 455 (Ct. App. 1996) (because proposed evidence may have been inadmissible as hearsay and had little probative value, trial court did not abuse its discretion in denying defendant’s motion to reopen).

State v. Portis, 187 Ariz. 336, 338, 929 P.2d 687, 689 (Ct. App. 1996) (in probation revocation proceeding, after state failed to present evidence showing that urine sample came from defendant, trial court did not abuse discretion in allowing state to reopen its case to establish this).

Paragraph (b) — Scope of cross-examination.

611.b.010 The trial court has considerable discretion in controlling the scope of cross-examination and in determining the relevance and admissibility of the evidence sought; in order to find error in the trial court’s restriction of cross-examination, the appellate court must find the trial court abused its discretion.

State v. Cañez, 202 Ariz. 133, 42 P.3d 564, ¶¶ 62–64 (2002) (trial court allowed defendant to cross-examine witness about current drug usage, extent and effect of drug usage on night of murder, and potential motive to commit offenses in order to obtain drugs; court held trial court’s ruling precluding defendant from cross-examining witness about remote drug usage did not violate defendant’s rights).

State v. Dickens, 187 Ariz. 1, 13–14, 926 P.2d 468, 480–81 (1996) (defendant wanted to introduce evidence of co-defendant’s character for impulsivity; trial court ruled that, if defendant introduced such evidence, state would be allowed to introduce evidence of homosexual relationship between defendant and co-defendant to show control defendant had over co-defendant).

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State v. Buccheri-Bianca, 233 Ariz. 324, 312 P.3d 123, ¶¶ 8–10 (Ct. App. 2013) (defendant was charged with molesting several children in family; defendant contended evidence that victim had applied for U-Visa status would show victim and her family had motive to fabricate or exaggerate any allegations; court noted nothing in record showed victim or her family knew about U-Visas when victim made allegations or that victim or any members of her family had unauthorized status, and great length of time between report of molestation and visa application supported trial court's conclusion that evidence of visa application was not relevant).

State v. Perez, 233 Ariz. 38, 308 P.3d 1189, ¶¶ 22–24 (Ct. App. 2013) (state had given plea agreement to R.F., one of defendant's friends; R.F. later had meeting with prosecutor and was released from jail following day; prosecutor avowed to trial court he had not agreed to R.F.'s pre-trial release, there had been no further promises made to R.F. during meeting, and there was nothing to disclose; court held trial court did not abuse discretion in precluding defendant from cross-examining R.F. about contents of his conversation with prosecutor during meeting).

Brethauer v. General Motors Corp., 221 Ariz. 192, 211 P.3d 1176, ¶¶ 13–14 (Ct. App. 2009) (at pre-trial deposition, emergency medical technician (Davis) who had treated plaintiff at accident scene stated he did not remember what plaintiff said, but checked box in report that said "not wearing seat belt," and that he would not have checked that box unless he had good information; trial court granted plaintiff's motion to preclude introduction of Davis's report or his testimony about plaintiff's seat belt usage; during cross-examination of plaintiff, defendant's attorney asked, "Now, after the accident, didn't you tell the paramedics at the scene that you were not wearing your seat belt?"; court held trial court properly denied plaintiff's motion for mistrial because trial court's order only precluded asking Davis about seat belt usage, it did not preclude asking plaintiff what he said to Davis).

611.b.015 A criminal defendant is entitled to confront a witness concerning potential bias or hope of reward.

State v. Todd, 244 Ariz. 374, 418 P.3d 1147, ¶¶ 11–16 (Ct. App. 2018) (defendant claimed trial court erred by precluding her from impeaching witness with evidence of his pending charges, contending such evidence demonstrated motive to fabricate with hope that state would show him leniency by cooperating against defendant; court held pending charge was relevant to whether witness had motive to fabricate, thus jurors were entitled to know not only that witness was facing a charge, but also to hear directly from witness whether his testimony was animated by promise, hope, or expectation of leniency in his own case, thus trial court erred by entirely precluding defendant from impeaching witness with his potential motivations, but held, because reliable evidence corroborating witness's testimony predated his need for leniency, probative value of those charges was minimal, and any error in precluding this line of cross-examination was therefore harmless).

State v. Todd, 244 Ariz. 374, 418 P.3d 1147, ¶¶ 17–20 (Ct. App. 2018) (defendant claimed trial court erred by precluding her from impeaching witness with evidence of potential charges, contending such evidence demonstrated motive to fabricate with hope that state would show him leniency by cooperating against defendant; because witness admitted he was worried about being charged as prohibited possessor, he had potential motive to fabricate; jurors should have had opportunity to determine whether witness's fear of being charged motivated him to fabricate, thus defendant should have been allowed to cross-examine witness about that concern and whether it was motivating witness's testimony; however, given circumstances of this case, any error was harmless).

611.b.020 Arizona allows a broad scope of cross-examination, the unreasonable limitation of which will normally result in a reversal.

Downs v. Scheffler, 206 Ariz. 496, 80 P.3d 775, ¶¶ 20–29 (Ct. App. 2003) (child was born in 1991; mother was awarded sole custody with father receiving parenting time and grandmother receiving visitation; mother and child lived with grandmother, and in 1992, mother moved out and stopped

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seeing child until 1999; in 2000, both parents consented to appointment of grandmother as child's guardian; in 2001, grandmother petitioned court to grant her legal custody of child; Conciliation Services evaluator prepared report concluding it was in child's best interest for mother to retain sole legal custody, and testified she had formed her opinion on information not contained in report and that she would not reveal in grandmother's presence; although trial court admitted report in evidence, it would not allow grandmother to cross-examine evaluator because grandmother had not yet established that mother was not fit parent; court held issue was best interests of child, and that trial court erred in not allowing cross-examination of evaluator).

Arizona Indep. Redist. Comm'n v. Fields, 206 Ariz. 130, 75 P.3d 1088, ¶¶ 42–50 (Ct. App. 2003) (Arizona Independent Redistricting Commission hired National Demographics Corporation as lead consultant in redistricting process and then named NDC personnel as testifying experts; court held that, because (1) Arizona allows full cross-examination of expert witnesses, (2) rules of civil procedure allow full discovery of expert witnesses, and (3) it is beneficial to have a bright-line for discovery for expert witnesses who are both consulting experts and testifying experts, if party designates consulting expert as testifying expert, party will waive any work-product privilege for communications with that expert, thus IRC waived any legislative privilege for communication with those experts, any materials reviewed by them, and subject of expert's testimony).

611.b.025 The trial court has the discretion to preclude cross-examination about a document that has not been admitted in evidence.

State v. Ellison, 213 Ariz. 116, 140 P.3d 899, ¶¶ 52–53 (2006) (in February 1999, victims were killed; victims' daughter testified she saw defendant working at her parents' house in July or August 1998; defendant sought to impeach her with defendant's Arizona Department of Corrections records that showed he was in prison from May 1998 through January 1999; court noted that AzDOC records had not been admitted in evidence, and held that trial court did not abuse discretion in ruling that defendant could not use records during witness's cross-examination absent their admission in evidence).

611.b.030 The constitutional right of the defendant to cross-examine witnesses does not give the defendant the right to cross-examine on irrelevant matters.

State v. Carreon, 210 Ariz. 54, 107 P.3d 900, ¶¶ 35–37 (2005) (because defendant failed to show how two other murders were related to charges against defendant, precluding cross-examination about these murders did not violate defendant's Sixth Amendment rights).

State v. Cañez, 202 Ariz. 133, 42 P.3d 564, ¶¶ 62–64 (2002) (trial court allowed defendant to cross-examine witness about his current drug usage, extent and effect of witness's drug usage on night of murder, and witness's potential motive to commit offenses in order to obtain drugs; court held trial court's ruling precluding defendant from cross-examining witness about remote drug usage did not violate defendant's rights).

State v. Hoskins, 199 Ariz. 127, 14 P.3d 977, ¶¶ 59–64 (2001) (defendant asserted that he told his sister that an unknown person named "Paul" gave him gun used in murder and that sister told witness about this, and contended he should have been allowed to cross-examine witness about these conversations; court held that these were self-serving hearsay statements and too vague to establish third-party culpability, thus trial court properly precluded them).

State v. Riggs, 189 Ariz. 327, 334, 942 P.2d 1159, 1166 (1997) (defendant asked victim if he refused to be interviewed, state objected, and trial court sustained objection; court held defendant failed to show reason victim's refusal to be interviewed had any relevance).

State v. Winegardner, 242 Ariz. 430, 397 P.3d 363, ¶¶ 19–23 (Ct. App. 2017) (defendant sought to impeach victim-witness (who was 15 years old at time of offense in 2012) with evidence that she was convicted of shoplifting in 2015; court held evidence of conviction was not necessary to reveal any

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possible biases, prejudices, or ulterior motives behind victim's testimony, thus precluding defendant from impeaching victim did not violate defendant's due process and confrontation clause rights), *vac'd*, 243 Ariz. 482, 413 P.3d 683 (2018).

611.b.035 The confrontation clause guarantees only an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defendant might wish.

State v. King, 180 Ariz. 268, 275–76, 883 P.2d 1024, 1031–32 (1994) (because witness testified, defendant received right of confrontation, and it did not matter that witness did not answer numerous questions because of lack of memory, which trial court concluded was feigned).

State v. Salazar, 216 Ariz. 316, 166 P.3d 107, ¶¶ 9–10 (Ct. App. 2007) (when victim testified she did not remember or could not recall, prosecutor played her tape recorded statement; because victim was present and subject to cross-examination; admission of her out-of-court statement did not violate confrontation clause; court held confrontation clause does not guarantee witness will not give testimony marred by forgetfulness, confusion, or evasion).

State v. Real, 214 Ariz. 232, 150 P.3d 805, ¶¶ 2–9 (Ct. App. 2007) (officer administered FSTs to defendant and then took his statement; at trial, officer had no independent memory of investigation, so trial court allowed officer to read from his report; court held that, because officer testified and was subject to cross-examination, admission officer's testimony did not violate Sixth Amendment).

611.b.037 In a juvenile severance proceeding, when the state has introduced written reports containing statements of the child, the trial court must consider the best interest of the child in determining whether to allow the parent to call the child as a witness and cross-examine the child.

Arizona DCS v. Beene, 235 Ariz. 300, 332 P.3d 47, ¶¶ 9–20 (Ct. App. 2014) (court held trial court erred in allowing parents to call their children as witnesses and cross-examine them about statements contained in reports).

611.b.040 If the trial court improperly restricts the defendant's cross-examination of a witness, it will violate the defendant's constitutional right of cross-examination.

State v. Buccheri-Bianca, 233 Ariz. 324, 312 P.3d 123, ¶ 11 (Ct. App. 2013) (because record supported trial court's conclusion that victim's application for U-Visa status was not relevant, precluding cross-examination on that subject did not violate defendant's constitutional rights).

State v. Almaguer, 232 Ariz. 190, 303 P.3d 84, ¶¶ 21–26 (Ct. App. 2013) (defendant was charged with second-degree murder as result of killing victim during fight with victim and victim's family; defendant contended trial court should have allowed him to cross-examine victim's father about civil lawsuit father filed against defendant based on that fight; court agreed with defendant that father's lawsuit might show "prototypical form of bias" toward him because reasonable jurors could believe father's testimony was motivated by economic concerns; court held any error in excluding evidence of lawsuit was harmless because (1) defendant was faced with strong, if not overwhelming, evidence of guilt; (2) father was not only witness, all of whom testified consistently about fight; defendant was allowed to impeach father with statements he made in connection with lawsuit; and (3) lawsuit was already settled before defendant's trial started).

State v. Dunlap, 187 Ariz. 441, 455–56, 930 P.2d 518, 532–33 (Ct. App. 1996) (because portions of letter could have shown witness's bias and desire to alter testimony, trial court erred in limiting cross-examination, but error was harmless).

611.b.045 A defendant who has been allowed self-representation has the right to cross-examine the witnesses personally, and this right may be abrogated only if the state makes a showing by clear and convincing evidence that such cross-examination will injure the physical or psychological well-being of the witness.

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State ex rel. Montgomery v. Padilla (Simcox), 239 Ariz. 314, 371 P.3d 642, ¶ 13 (Ct. App. 2016) (court held trial court erred in “concluding *any* restriction of [defendant’s] right to personally cross-examine witness would be ‘a violation of constitutional proportion’ and reversible error”; court remanded so trial court could determine whether state has presented clear and convincing evidence of individualized and case-specific need for accommodation for each minor victim witness).

State ex rel. Montgomery v. Padilla (Simcox), 237 Ariz. 263, 349 P.3d 1100, ¶¶ 9–24 (Ct. App. 2015) (defendant was charged with sexual offenses with minors; victims were defendant’s 8-year-old daughter and daughter’s 8-year-old friend; state also intended to call daughter’s 7-year-old friend to testify about alleged incident she had with defendant; because state did not make showing that defendant’s cross-examination of victim-witnesses would injure their physical or psychological well-being; trial court correctly allowed defendant right to cross-examine victim-witnesses).

611.b.090 The trial court has the discretion to permit re-cross-examination on any new issue raised on re-direct.

State v. Burns, 237 Ariz. 1, 344 P.3d 303, ¶ 53 (2015) (defendant contended he should have been allowed to re-cross-examine his former fiancée about telephone conversation wherein she told defendant’s co-worker she was not afraid of defendant and defendant was never violent with women; because defendant’s attorney asked about this conversation on cross-examination and no new issue arose during re-direct examination that would warrant re-cross-examination, trial court did not abuse discretion in not permitting re-cross-examination).

611.b.100 There is no right, nor should a trial court permit, the use of re-cross-examination to repeat or re-emphasize matters already covered on cross-examination.

State v. Rienhardt, 190 Ariz. 579, 587, 951 P.2d 454, 462 (1997) (on cross-examination, defendant elicited inconsistent statement from state’s key witness; on re-direct, trial court allowed state to introduce prior consistent statements; defendant claimed this precluded him from cross-examining witness about inconsistencies; court held that defendant had already brought out inconsistencies in cross-examination).

Paragraph (c) — Leading questions.

611.c.010 A leading question is one that suggests the desired answer, not one whose answer is obvious.

State v. McKinney, 185 Ariz. 567, 575, 917 P.2d 1214, 1222 (1996) (after prosecutor received negative response to question whether witness had seen anything in trunk of car, asking, “Did you see at any time Mike Hedlund’s rifle?” was not leading question).

State v. McKinney, 185 Ariz. 567, 575, 917 P.2d 1214, 1222 (1996) (asking witness, “[D]id [defendant] appear to be slightly more aggressive towards you or Chris?” was not leading).

State v. Agnew, 132 Ariz. 567, 577, 647 P.2d 1165, 1175 (Ct. App. 1982) (court stated that “[T]he cat was black, wasn’t it?” was leading question; court held that “Had you known that the trust was not insured would you have invested?” was not leading question).

611.c.020 The trial court has discretion to allow leading questions on direct examination when necessary to develop testimony.

State v. Duffy, 124 Ariz. 267, 273–74, 603 P.2d 538, 544–45 (Ct. App. 1979) (no abuse discretion in allowing leading questions on direct examination in complex land fraud case involving actions over period of 7 years, when trial lasted over 1 month and resulted in 14 volumes of transcripts).

611.c.030 The use of leading questions is not reversible error when the evidence covered by the leading questions is already before the jurors.

State v. Payne, 233 Ariz. 484, 314 P.3d 1239, ¶¶ 119–20 (2013) (court stated no error occurs when answer suggested had already been received as result of proper questioning).

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State v. Garcia, 141 Ariz. 97, 101, 685 P.2d 734, 738 (1984) (because one witness had already testified he felt in danger because of defendant's actions, asking second witness to confirm fact that he felt threatened was not error).

611.c.040 Failure to object to the use of leading questions precludes review on appeal.

State v. Cardenas, 146 Ariz. 193, 196–97, 704 P.2d 834, 837–38 (Ct. App. 1985) (counsel moved in limine to preclude leading questions; trial court reserved ruling and counsel never objected at trial).

611.c.050 When a party asks non-leading, open-ended questions on cross-examination, the party runs the risk of obtaining unfavorable answers.

State v. Stuard, 176 Ariz. 589, 600–01, 863 P.2d 881, 892–93 (1993) (because defendant's attorney was aware officer knew defendant had been in prison, but nonetheless asked broad question that called for response that defendant had been in prison, rather than asking narrow, leading question, any error was invited by attorney's question).

State v. Lundstrom, 161 Ariz. 141, 150, 776 P.2d 1067, 1076 (1989) (by asking non-leading, open-ended questions on cross-examination, state invited defendant's expert witness to repeat fact that opinion of non-testifying expert was same as witness's opinion).

611.c.060 When the other party's expert witness gives an opinion, discloses that the opinion is based on the opinion of a non-testifying expert, and discloses what that other opinion was, the party may call the non-testifying expert as a witness and examine that expert by cross-examination, which would include using leading questions.

State v. Lundstrom, 161 Ariz. 141, 147, 776 P.2d 1067, 1073 (1989) (defendant's expert witness had relied at least to some extent on opinion of non-testifying expert; state made no request to call non-testifying expert as witness).

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Rule 612. Writing Used To Refresh a Witness's Memory.

(a) Scope. This rule gives an adverse party certain options when a witness uses a writing to refresh memory:

(1) while testifying; or

(2) before testifying, if the court decides that justice requires the party to have those options.

(b) Adverse Party's Options; Deleting Unrelated Matter. An adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness about it, and to introduce in evidence any portion that relates to the witness's testimony. If the producing party claims that the writing includes unrelated matter, the court must examine the writing in camera, delete any unrelated portion, and order that the rest be delivered to the adverse party. Any portion deleted over objection must be preserved for the record.

(c) Failure to Produce or Deliver the Writing. If a writing is not produced or is not delivered as ordered, the court may issue any appropriate order. But if the prosecution does not comply in a criminal case, the court must strike the witness's testimony or—if justice so requires—declare a mistrial.

Comment to 2012 Amendment

The language of Rule 612 has been amended to conform to the federal restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Comment to Original 1977 Rule

Subparagraphs (1) and (2) of Federal Rule 612 have been reversed in order to clarify the intent of the rule which is to invoke the court's discretion concerning matters used before testifying and to have production as a matter of right of materials used while testifying. The word "action" in the second sentence of the rule replaces "testimony" in the Federal Rule to accord with the broader scope of cross-examination used in Arizona.

Cases

612.010 When a witness does not remember making a particular statement, a party may use a writing to refresh the witness's memory for the purpose of testifying.

State v. Ortega, 220 Ariz.320, 206 P.3d 769, ¶¶ 30–33 (Ct. App. 2008) (victim's brother saw defendant molest victim; when called to testify, brother did not remember many details of events or his statements to police detective; trial court properly allowed state to read to brother excerpts from his interview with police, whereupon he remembered telling detective that defendant threatened him if he told anyone what had happened).

612.020 In order to use a writing to refresh a witness's recollection, all that is required is that the writing serves to revive the independent recollection of the witness.

State v. Hall, 18 Ariz. App. 593, 596, 504 P.2d 534, 537 (1973) (defendant charged with receiving stolen property; even though witness could not read or write English, witness could recognize his signature and certain numbers, thus trial court did not err in allowing witness to refresh his recollection with one of defendant's written records).

612.030 In order to refresh a witness's recollection with a recording, the witness should listen to the recording outside of the presence of the jurors; if the witness's recollection is refreshed, the witness may then testify; if the witness's recollection is not refreshed, the party may then seek to have the recording admitted under Rule 803(5).

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State v. Salazar, 216 Ariz. 316, 166 P.3d 107, ¶¶ 8 & n.2 (Ct. App. 2007) (when victim testified she did not remember or could not recall, prosecutor played her tape recorded statement; to extent trial court allowed tape to be played in presence of jurors, trial court erred, but because recorded statement impeached her testimony, any error in playing of recording was harmless).

612.040 If a party allows a witness to refresh the witness's memory with a writing protected by a privilege, the party waives the privilege and the other party will have the right to have produced those portions of the writing that could have had an influence on the witness's testimony.

Samaritan Health Serv. v. Superior Ct., 142 Ariz. 435, 438, 690 P.2d 154, 157 (Ct. App. 1984) (defendant's attorney allowed witnesses to refresh their memories with interview summaries containing impressions and thought processes as well as factual matters; court held defendant's actions waived attorney-client and work product privileges for those portions of writings that could have had influence witnesses's testimony).

612.050 A party may not use inadmissible evidence to refresh a witness's memory.

Tuzon v. MacDongall, 137 Ariz. 482, 489, 671 P.2d 923, 930 (Ct. App. 1983) (petitioner asked witness whether polygraph examination had been arranged for him; when witness answered no, petitioner sought to use newspaper article that had not been marked as exhibit, stating he wanted to refresh witness's recollection; court held trial court did not err in ruling that newspaper article was hearsay and that it could not be used for impeachment).

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Rule 613. Witness's Prior Statement.

(a) Showing or Disclosing the Statement During Examination. When examining a witness about the witness's prior statement, a party need not show it or disclose its contents to the witness. But the party must, on request, show it or disclose its contents to an adverse party's attorney.

(b) Extrinsic Evidence of a Prior Inconsistent Statement. Extrinsic evidence of a witness's prior inconsistent statement is admissible only if the witness is given an opportunity to explain or deny the statement and an adverse party is given an opportunity to examine the witness about it, or if justice so requires. This subdivision (b) does not apply to an opposing party's statement under Rule 801(d)(2).

Comment to 2012 Amendment

The language of Rule 613 has been amended to conform to the federal restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Cases

613.010 A party may not impeach a witness by implying the existence or non-existence of statements or facts that it is not able to prove.

State v. Hines, 130 Ariz. 68, 71, 633 P.2d 1384, 1387 (1981) (because witness admitted her prior statement did not contain details contained in her trial testimony, and transcript of prior statement contained details different from her trial testimony, prosecutor's cross-examination did not amount to impeachment by insinuation).

613.015 The trial court has the discretion to preclude cross-examination about a document that has not been admitted in evidence.

State v. Ellison, 213 Ariz. 116, 140 P.3d 899, ¶¶ 52–53 (2006) (in February 1999, victims were killed; victims' daughter testified she saw defendant working at her parents' house in July or August 1998; defendant sought to impeach her with defendant's Arizona Department of Corrections records that showed he was in prison from May 1998 through January 1999; court noted that AzDOC records had not been admitted in evidence, and held that trial court did not abuse discretion in ruling that defendant could not use records during witness's cross-examination absent their admission in evidence).

613.020 An omission will constitute an inconsistent statement only when the witness made it under circumstances where the witness should have, or was likely to have, made a statement.

State v. Hines, 130 Ariz. 68, 70, 633 P.2d 1384, 1386 (1981) (in trial testimony, defendant's alibi witness gave detailed account of defendant's whereabouts, but had failed to give this account when questioned by prosecutor prior to trial; court concluded that witness should have realized prosecutor was interested in learning everything witness knew about defendant's activities, and failure to give this account to prosecutor was proper grounds for impeachment).

613.030 To be an inconsistent statement, it must vary materially from that made at trial, and this must be determined from the whole impression or effect of what has been said or done, and not from the individual words or phrases alone.

State v. Hines, 130 Ariz. 68, 71, 633 P.2d 1384, 1387 (1981) (inconsistency was whether defendant was driving own car or brother's car; when viewed alone, this would not be material variance, but when viewed together with surrounding facts, defendant's actions resulting from driving own car would have been totally inconsistent with his actions that would have resulted from driving brother's car).

613.040 In order for the trial court to determine whether the proposed statement varies materially from that made at trial, the offering party must inform the trial court what the proposed statement is, typically by offer of proof, and if the offering party does not make an offer of proof, the reviewing court may determine that the party has waived the issue on appeal.

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State v. Hernandez, 232 Ariz. 313, 305 P.3d 378, ¶¶ 37–44 (2013) (defendant sought to impeach witness with two prior statements; when trial court rule against defendant and did not allow admission of either statement, defendant did not make offer of proof; on appeal court held defendant waived issue by not making offer of proof).

613.050 A prior inconsistent statement may be used for substantive as well as impeachment purposes.

State v. Huerstel, 206 Ariz. 93, 75 P.3d 698, ¶ 42 n.9 (2003) (defendant's witnesses testified that codefendant told them he shot all three victims; trial court then allowed state to introduce codefendant's statement to police in which he claimed defendant shot all three victims; court held admission of codefendant's statement to police violated confrontation clause, thus trial court erred in admitting it; court noted that use of prior inconsistent statement as substantive evidence is predicated on fact that witness who made statement testifies at trial and thus is subject to cross-examination, but when prior inconsistent statement is admitted under Rule 806, declarant has not testified at trial and thus is not subject to cross-examination, so only way statement could be used is for impeachment and not as substantive evidence).

Reed v. Hinderland, 135 Ariz. 213, 216, 660 P.2d 464, 467 (1983) (once plaintiff testified he had never told anyone accident was his son's fault and that he did not remember signing a release form, defendant was allowed to introduce a release form signed by plaintiff and a letter from his attorney to his insurance company stating that son's negligence caused accident; letter from attorney was admissible because attorney was acting as plaintiff's agent).

State v. Acree, 121 Ariz. 94, 97, 588 P.2d 836, 839 (1978) (2 days after assault, victim told police defendant pointed gun at her and had tried to shoot her; at trial, victim testified that defendant never pointed gun at her, that she did not believe defendant would have shot or harmed her, and that she could have blown entire matter out of proportion; state was then allowed to impeach victim's trial testimony with statement she made during police interview; defendant contended that trial court erred in allowing use of prior inconsistent statements for substantive purposes; court held evidence was admissible for substantive purposes and notes Rule 801(d) codified prior holding of court).

613.060 Prior inconsistent statements that are admissions are also admissible under Rule 801(d)(2).

Hellyer v. Hellyer, 129 Ariz. 453, 455–56, 632 P.2d 263, 265–66 (Ct. App. 1981) (statements were husband's description of nature of transfer of property from him to his wife).

613.070 A prior inconsistent statement is not conclusive and may be contradicted or rebutted, with the trier-of-fact to determine the weight to be given to it.

Ohio Farmers Ins. Co. v. Norman, 122 Ariz. 330, 332, 594 P.2d 1026, 1028 (Ct. App. 1979) (plaintiff's statement that fire might have started in his home was rebutted by physical evidence, testimony of expert witnesses, and witnesses who first saw fire).

613.080 Rule 408 precludes use of a consent judgment to prove substantive facts to establish liability for a subsequent claim, and a consent judgment likewise may not be used for impeachment purposes under Rule 613.

- * *Phillips v. O'Neil*, 243 Ariz. 299, 407 P.3d 71, ¶¶ 26–28 (2017) (Arizona Attorney General sued Phillips for violations of Arizona Consumer Fraud Act, alleging he mailed deceptive advertisements to Arizona consumers; Phillips agreed to consent judgment, in which he waived his right to a trial, admitted his actions violated the CFA and a federal regulation, and agreed to pay restitution, attorney fees, and civil penalties; court held State Bar was precluded from introducing evidence of consent judgment in disciplinary proceedings pending against Phillips relating to same conduct).

WITNESSES

Paragraph (a) —Showing or Disclosing the Statement During Examination.

613.a.010 Rule 613(a) explicitly abolished the requirements that the examiner first ask the witness whether the witness made a statement, giving its substance and naming the time, place, and person to whom made.

State v. Hines, 130 Ariz. 68, 70, 633 P.2d 1384, 1386 (1981) (after witness had testified on direct, prosecutor asked her about prior statements she had made when he interviewed her without asking her traditional foundational questions).

613.a.020 Rule 15, ARIZ. R. CRIM. P., requires a party to disclose statements of only those witnesses it intends to call, and does not require it to disclose statements it intends to use to impeach other party's witnesses; impeachment is instead governed by Rule 613(a), which requires only that a party disclose the prior statement at the time of the questioning, and only if opposing counsel requests such disclosure.

Osborne v. Superior Ct., 157 Ariz. 2, 5, 754 P.2d 331, 334 (Ct. App. 1988) (trial court erred in ordering defendant to disclose transcripts of defendant's interviews of state's witnesses).

613.a.025 Merely because this rule requires a party to show or disclose the contents of a witness's prior statement to an adverse party's attorney does not preclude a trial court from ordering disclosure before trial of impeachment evidence in an appropriate case.

Wells v. Fell, 231 Ariz. 525, 297 P.3d 931, ¶¶ 15–16 (Ct. App. 2013) (defendant charged with assaulting police officer; unbeknownst to prosecutor, defendant's attorney interviewed some police-officer witnesses; court rejected defendant's contention that he was not required to disclose interview statements because he intended to use them for impeachment only; court held statements were subject to disclosure if state could show substantial need and undue hardship).

Paragraph (b) —Extrinsic evidence of prior inconsistent statement of witness.

613.b.010 This rule, which requires granting a witness the opportunity to explain or deny the statement, does not apply to statements by a party-opponent as defined in Rule 801(d)(2).

Lynn v. Helitec Corp., 144 Ariz. 564, 570, 698 P.2d 1283, 1289 (Ct. App. 1984) (trial court erred in precluding introduction of prior statement because of failure of party to ask warning question, resulting in reversal and remand for new trial).

613.b.015 The trial court has the discretion to preclude cross-examination about a document that has not been admitted in evidence.

State v. Ellison, 213 Ariz. 116, 140 P.3d 899, ¶¶ 52–53 (2006) (in February 1999, victims were killed; victims' daughter testified she saw defendant working at her parents' house in July or August 1998; defendant sought to impeach her with defendant's Arizona Department of Corrections records that showed he was in prison from May 1998 through January 1999; court noted that AzDOC records had not been admitted in evidence, and held that trial court did not abuse discretion in ruling that defendant could not use records during witness's cross-examination absent their admission in evidence).

613.b.020 A party may introduce a prior inconsistent statement before asking the witness about it as long as the witness at some point is given the opportunity to explain or deny the statement, and the other party is given the opportunity to examine the witness about it.

State v. Emery, 131 Ariz. 493, 504, 642 P.2d 838, 839 (1982) (after state examined witness, defendant reserved cross-examination; state called another witness and used that witness to introduce inconsistent statements made by first witness; defendant never cross-examined first witness, with result that witness was never given opportunity to explain inconsistencies, and thus trial court should not have allowed introduction of prior inconsistent statements).

State v. Acree, 121 Ariz. 94, 96–97, 588 P.2d 836, 838–39 (1978) (during witness's testimony, prosecutor interrupted questioning, played tape of witness's prior inconsistent statements, and then resumed questioning witness, giving her a chance to explain inconsistencies).

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613.b.030 The party introducing a prior inconsistent statement does not have to be the one who gives the witness the opportunity to explain as long as the witness receives that opportunity, but if the party does not intend to give the witness the opportunity to explain, it should so inform the trial court so that the other party may keep the witness available to explain.

State v. Emery, 131 Ariz. 493, 504, 642 P.2d 838, 839 (after state examined witness, defendant reserved cross-examination; state called another witness and used that witness to introduce inconsistent statements made by first witness; defendant never cross-examined first witness, with result that witness was never given opportunity to explain inconsistencies, and thus trial court should not have allowed introduction of prior inconsistent statements).

613.b.040 When a witness denies or does not remember making the statement, the party questioning the witness is not required to prove the making of the statement, it merely has the option of introducing the statement.

State v. Hines, 130 Ariz. 68, 72, 633 P.2d 1384, 1388 (1981) (after witness had testified on direct, prosecutor asked her about prior inconsistent statements she had made; when she stated she did not remember making them, prosecutor let it go at that and did not offer extrinsic evidence of prior inconsistent statements).

613.b.050 When a witness denies or does not remember making the statement, the party may then introduce extrinsic evidence of the prior statement.

State v. Robinson, 165 Ariz. 51, 58–59, 796 P.2d 853, 860–61 (1990) (trial court allowed impeachment, stating it did not know whether witness was being evasive or was merely typical of many people with poor recollection).

State v. Ortega, 220 Ariz. 320, 206 P.3d 769, ¶¶ 30–33 (Ct. App. 2008) (victim's brother saw defendant molest victim; when called to testify, brother either did not remember his prior statements to police detective or denied making them; trial court properly allowed state to read to brother excerpts from his interview with police, whereupon he remembered telling detective that defendant threatened him if he told anyone what had happened).

613.b.060 When a witness admits making the prior inconsistent statement, the trial court has discretion in deciding whether to admit extrinsic evidence of the statement; such extrinsic evidence usually will be unnecessary, but should be admitted when the statement itself has substantive use or would assist the jurors in determining which of various inconsistent statements is true.

State v. Rutledge (Sherman), 205 Ariz. 7, 66 P.3d 50, ¶¶ 14–25 (2003) (witness who testified at trial admitted making prior statement to police that was videotaped, and admitted all inconsistencies between trial testimony and videotaped interview, and offered explanations for those inconsistencies; defendant contended prior statements therefore were not inconsistent with trial testimony, and thus contended trial court abused discretion in admitting extrinsic evidence of prior statement (the videotape); court noted there were, in fact, several inconsistencies between witness's trial testimony and the videotaped interview, and that witness testified that he had lied to police because he was scared, had been threatened, and was intoxicated, and thus held videotape was admissible to allow jurors to assess witness's demeanor and credibility, and helped them decide which of witness's accounts to believe).

State v. Woods, 141 Ariz. 446, 451–53, 687 P.2d 1201, 1206–08 (1984) (trial court should admit extrinsic proof when necessary for jurors to hear tone of voice on tape recording, to see handwriting on document, or to view demeanor of witness on videotape; court held present case did not fall within those categories, thus trial court did not abuse discretion precluding defendant from playing taped statement to jurors).

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Rule 614. Court's Calling or Examining a Witnesses.

(a) Calling. The court may call a witness on its own or at a party's request. Each party is entitled to cross-examine the witness.

(b) Examining. The court may examine a witness regardless of who calls the witness.

(c) Objections. A party may object to the court's calling or examining a witness either at that time or at the next opportunity when the jury is not present.

Comment to 2012 Amendment

The language of Rule 614 has been amended to conform to the federal restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Cases**Paragraph (a) — Calling by court.**

614.a.010 The trial court has broad discretion whether and when to call its own witness.

State v. Johnson, 183 Ariz. 623, 635, 905 P.2d 1002, 1014 (Ct. App. 1995) (after jurors began deliberations, they sent note to trial court asking how photographs in photographic lineup were mounted and whether defendant had a limp at time of attack; trial court consulted with attorneys, recalled detective as "court's witness," told jurors it was doing so because detective was only witness who could answer jurors' question, asked detective only questions jurors had asked, and gave both attorneys opportunity to cross-examine detective, which defendant declined; court held that this was not an abuse of trial court's discretion and that it did not prejudice defendant), *approved on other grounds*, 186 Ariz. 329, 922 P.2d 294 (1996).

State v. Vaughn, 124 Ariz. 163, 165, 602 P.2d 831, 833 (Ct. App. 1979) (co-defendant gave statements implicating defendant, and entered into plea agreement; prior to trial, co-defendant recanted his earlier statements implicating defendant; trial court called co-defendant as court's witness, which allowed both parties to cross-examine him).

Paragraph (b) — Interrogation by court.

614.b.010 The trial court has discretion to ask questions of a witness as part of its duty to see that the truth is developed.

State v. Schackart, 190 Ariz. 238, 256, 947 P.2d 315, 333 (1997) (trial court did not abuse discretion in questioning defendant's expert witness at aggravation/mitigation hearing).

614.b.020 The trial court has discretion to ask questions submitted in writing by a juror.

State v. Johnson, 183 Ariz. 623, 635, 905 P.2d 1002, 1014 (Ct. App. 1995) (after deliberations began, jurors sent note to trial court asking how photographs in photo lineup were mounted and whether defendant had limp at time of attack; trial court consulted with attorneys, recalled detective as "court's witness," told jurors it was doing so because detective was only one who could answer their question, asked detective only questions jurors had asked, and gave both attorneys opportunity to cross-examine, which defendant declined; court held this was not an abuse of trial court's discretion and did not prejudice defendant), *approved on other grounds*, 186 Ariz. 329, 922 P.2d 294 (1996).

State v. LeMaster, 137 Ariz. 159, 164, 669 P.2d 592, 597 (Ct. App. 1983) (after attorneys examined each witness, trial court had recess during which jurors were allowed to submit questions; trial court then discussed questions with attorneys, resumed trial, and asked witness questions it found acceptable).

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Rule 615. Excluding Witnesses.

At a party's request, the court must order witnesses excluded so that they cannot hear other witnesses' testimony. Or the court may do so on its own. But this rule does not authorize excluding:

- (a) a party who is a natural person;
- (b) an officer or employee of a party that is not a natural person, after being designated as the party's representative by its attorney;
- (c) a person whose presence a party shows to be essential to presenting the party's claim or defense;
- (d) a person authorized by statute to be present; or
- (e) a victim of crime, as defined by applicable law, who wishes to be present during proceedings against the defendant.

Comment to 2012 Amendment

This rule has been amended to conform to Federal Rule of Evidence 615, including the addition of subsection (d).

Subsection (e) (formerly subsection (d)), which is a uniquely Arizona provision, has been retained but amended to reflect that "a victim of crime" means a crime victim "as defined by applicable law," which includes any applicable rule, statute, or constitutional provision. The rule previously provided that "a victim of crime" would be "as defined by Rule 39(a), Rules of Criminal Procedure."

Additionally, the language of Rule 615 has been amended to conform to the federal restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent in the restyling to change any result in any ruling on evidence admissibility.

Comment to 1991 Amendment

The 1991 amendment to Rule 615 was necessary in order to conform the rule to the victim's right to be present at criminal proceedings, recognized in Ariz. Const. Art. II, § 2.1(A)(3).

Author's Comment

Rule 9.3 of the Arizona Rules of Criminal Procedure provides as follows:

Rule 9.3. Exclusion of Witnesses and Spectators**(a) Witnesses.**

(1) *Generally.* The court may, and at the request of either party must, exclude prospective witnesses from the courtroom during opening statements and other witnesses' testimony. If the court finds that a party's claim that a person is a prospective witness is not made in good faith, it may not exclude the person.

(2) Exceptions.

(A) *Victim.* A victim has a right to be present at all proceedings at which the defendant has that right.

(B) *Investigator.* If the court enters an exclusion order, both the defendant and the State are nevertheless entitled to the presence of one investigator at counsel table.

(3) *Instruction.* As part of its exclusion order, the court must instruct the witnesses not to communicate with each other about the case until all of them have testified.

(4) *After Testifying.* Once a witness has testified on direct examination and has been made available to all parties for cross-examination, the court must allow the witness to remain in the courtroom, unless a party requests continued exclusion because the witness may be recalled or the court finds that the witness's presence would be prejudicial to a fair trial.

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(b) Spectators.

(1) *Generally*. All proceedings must be open to the public, including news media representatives, unless the court finds, on motion or on its own, that an open proceeding presents a clear and present danger to the defendant's right to a fair trial by an impartial jury.

(2) *Record*. The court must keep a complete record of any closed proceedings and make it available to the public following the trial's completion or, if no trial occurs, the final disposition of the case.

(c) **Protection of a Witness**. The court may exclude all spectators, except news media representatives, during a witness's testimony if the court finds it is reasonably necessary to protect the witness's safety or to protect the witness from embarrassment or emotional disturbance.

Cases

615.010 Exclusion of a witness is mandatory when requested in both civil and criminal cases, unless the party is able to show the witness's presence is essential to the presentation of the party's claim or defense.

Spring v. Bradford, 243 Ariz. 167, 403 P.3d 579, ¶ 13 (2017) (Rule 615 requires trial court, when requested, to exclude witnesses so they cannot hear other witnesses' testimony).

Nia v. Nia, 242 Ariz. 419, 396 P.3d 1099, ¶¶ 34–36 (Ct. App. 2017) (mother contended trial court's exclusion of her expert witness during father's testimony prejudiced her ability to present her case; on appeal, mother did not argue that her expert witness on finances was "essential" to the presentation of her case, but instead her expert witness's presence may have been helpful if expert had opportunity to hear father's testimony so he could provide contradictory evidence; trial court noted expert was not necessary because parties had "ample time to do discovery" and "there's [not] another expert on the other side"; court held trial court's exclusion of expert from the courtroom was not abuse of discretion).

615.025 Under the Victims' Bill of Rights, if the victim is a minor, the victim's parent may exercise all of the victim's rights in addition to the victim, including the right to be present during all proceedings when the defendant has the right to be present; when a parent is to be a witness, this provision conflicts with Rule 615, so the Constitutional provisions prevail, and thus Rule 615 will not preclude a parent from being a witness.

State v. Fulminante, 193 Ariz. 485, 975 P.2d 75, ¶¶ 58–59 (1999) (trial court did not err in refusing to exclude minor victim's mother, who was also a witness).

State v. Uriarte, 194 Ariz. 275, 981 P.2d 575, ¶¶ 17–19 (Ct. App. 1998) (defendant was charged with child molestation, sexual conduct with minor, and public sexual indecency involving his 12-year-old sister-in-law; during trial, victim's mother was in courtroom, and defendant objected when state called mother as rebuttal witness; court rejected defendant's contention that parent may only exercise rights "instead of" victim and not "in addition to" victim, and held instead that victim and parent may exercise rights together).

615.030 There is no general requirement that a party must invoke the rule at a particular time or else lose the right to invoke it at all.

State v. Edwards, 154 Ariz. 8, 13–14, 739 P.2d 1325, 1330–31 (Ct. App. 1986) (if trial court asks parties if they wish to invoke rule and they decline to do so, one party presents its case and then asks trial court to invoke rule while other party is presenting its case, first party would lose right to have trial court invoke rule only upon showing that party intentionally deceived or "sandbagged" other party).

615.040 Rule 9.3(d), ARIZ. R. CRIM. P., states that a party is allowed to have an investigator present, which means a person who has acquired factual information and is in a position to call counsel's attention to factual matters of which counsel may not be aware.

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State v. Wilson, 185 Ariz. 254, 259–60, 914 P.2d 1346, 1351–52 (Ct. App. 1995) (trial court did not abuse its discretion in excluding person who had photographed crime scene for defendant and had digested transcripts from first trial, but did not have any background as investigator, did not interview any witnesses, and did not testify about her investigation in this case).

615.050 Although Rule 9.3(d), ARIZ. R. CRIM. P. states a party is allowed to have one investigator present, if the party shows that more than one person is essential for the presentation of the party's case, the trial court may allow more than one person to be present throughout the trial.

State v. Williams, 183 Ariz. 368, 379–80, 904 P.2d 437, 448–49 (1995) (because different officer investigated each of two separate crimes that were joined for trial, trial court properly allowed state to have two officers present throughout trial).

615.060 This rule does not automatically exempt an expert witness from exclusion.

Spring v. Bradford, 243 Ariz. 167, 403 P.3d 579, ¶¶ 15–16 (2017) (in medical malpractice case, at start of trial, with both parties' agreement, trial court ordered rule of exclusion of witnesses would be in effect; during trial, defendant's attorney provided expert witnesses with transcripts of testimony by plaintiff's expert witnesses; trial court found defendant's attorney violated exclusion order; court rejected defendant's contention that expert witness is always "essential witness" and therefore not subject to exclusion, but concluded trial court's action of providing instructions to jurors was sufficient to correct any error).

615.070 Even though the trial court has invoked the rule excluding a witness, the trial court may allow an expert witness to review transcribed testimony in order to prepare to testify.

Spring v. Bradford, 243 Ariz. 167, 403 P.3d 579, ¶¶ 30–35 (2017) (in medical malpractice case, defendant's attorney provided expert witnesses with transcripts of testimony by plaintiff's expert witnesses; trial court noted that, had counsel sought permission, it likely would have allowed both sides' experts to review or observe trial testimony).

McGuire v. Caterpillar Tractor Co., 151 Ariz. 420, 425, 728 P.2d 290, 295 (Ct. App. 1986) (court cited as authority *M. UDALL & J. LIVERMORE, ARIZONA LAW OF EVIDENCE* § 64 (2d ed. 1982), which states, "[O]ne party's expert might be allowed to hear the other party's expert testify so as to be able to suggest lines of inquiry on cross-examination." *J. LIVERMORE, R. BARTELS, & A. HAMEROFF, ARIZONA PRACTICE, LAW OF EVIDENCE* § 615:1 at 389 (Rev. 4th ed. 2008), now states, "Thus, even though an exclusion order has been requested and made, the Court can permit one side's expert witness to hear or review the testimony of the opposing side's expert in order to be in a position to suggest areas for cross-examination.").

615.080 A rebuttable presumption of prejudice applies only in those limited cases in which a witness's Rule 615 violation is substantial and makes proving the existence of prejudice nearly impossible; in all other cases, the moving party at least must prove that a witness's Rule 615 violation gave rise to an objective likelihood of prejudice.

Spring v. Bradford, 243 Ariz. 167, 403 P.3d 579, ¶¶ 17–29 (2017) (in medical malpractice case, defendant's attorney provided expert witnesses with transcripts of testimony by plaintiff's expert witnesses; trial court noted that, had counsel sought permission, it likely would have allowed both sides' experts to review or observe trial testimony; court concluded trial court's action of providing instructions to jurors was sufficient to correct any error).

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ARTICLE 7. OPINION AND EXPERT TESTIMONY

Introductory Note to Original 1977 Rules: Problems of Opinion Testimony.

The rules in this article are designed to avoid unnecessary restrictions concerning the admissibility of opinion evidence; however, as this note makes clear, an adverse attorney may, by timely objection, invoke the court's power to require that before admission of an opinion there be a showing of the traditional evidentiary prerequisites. Generally, it is not intended that evidence which would have been inadmissible under pre-existing law should now become admissible.

A major objective of these rules is to eliminate or sharply reduce the use of hypothetical questions. With these rules, hypothetical questions should seldom be needed and the court will be expected to exercise its discretion to curtail the use of hypothetical questions as inappropriate and premature jury summations. Ordinarily, a qualified expert witness can be asked whether he or she has an opinion on a particular subject and then what that opinion is. If an objection is made and the court determines that the witness should disclose the underlying facts or data before giving the opinion, the witness should identify the facts or data necessary to the opinion.

In jury trials, if there is an objection and if facts or data upon which opinions are to be based have not been admitted in evidence at the time the opinion is offered, the court may admit the opinion subject to later admission of the underlying facts or data; however, the court will be expected to exercise its discretion so as to prevent the admission of such opinions if there is any serious question concerning the admissibility, under Rule 703 or otherwise, of the underlying facts or data.

Rule 701. Opinion Testimony by Lay Witnesses.

If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:

- (a) rationally based on the witness's perception;
- (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and
- (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

Comment to 2012 Amendment

The 2012 amendment of Rule 701 adopts Federal Rule of Evidence 701, as restyled.

Cases

701.010 Whether a lay witness is qualified to offer opinion is a preliminary determination for the trial court under Rule 104(a); this decision must be upheld unless shown to be clearly erroneous or an abuse of discretion.

- * *State v. Fuentes*, 247 Ariz. 516, 452 P.3d 746, ¶ 28 (Ct. App. 2019) (court found no error in trial court's preliminary determination that testimony in question was not based on technician's own perceptions and thus technician was not qualified to provide opinion testimony).

701.020 A witness who is not testifying as an expert may give testimony in the form of an opinion if the opinion is limited to one that is (a) rationally based on the witness's perception, (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

State v. Hughes, 193 Ariz. 72, 969 P.2d 1184, ¶ 47 (1998) (to be competent to offer opinion on person's sanity, lay witness must have had opportunity to observe past conduct and history of person; because witnesses only saw defendant after arrest and thus not over long period of time, these witnesses were not competent to give opinion on defendant's sanity).

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* *State v. Fuentes*, 247 Ariz. 516, 452 P.3d 746, ¶¶ 26–29 (Ct. App. 2019) (crime scene technician testified at pretrial motions hearing and mentioned having observed shoe prints that “might look similar to the ones that the deceased’s shoes may have created”; trial court asked, “And did you make that decision or did someone tell you that?”; technician replied: “[T]he detective at the time I believe said that they felt that it was—that the prints looked very similar to the shoes that the deceased [was] wearing”; based on that testimony, trial court concluded it was “absolutely clear from [technician] that he was giving opinions based on what other people told him”; court held trial court did not abuse discretion in determining technician was not qualified to provide opinion testimony in question because it was not based on his own perceptions).

State v. Peltz, 242 Ariz. 23, 391 P.3d 1215, ¶¶ 12–19 (Ct. App. 2017) (officer saw blood on driver’s side of vehicle (inside and outside of door, on seat, floorboard, and steering wheel), and no blood on passenger’s side of vehicle; saw that defendant had cut above left eye that was bleeding and saw blood on defendant’s hands; and saw no open cuts on passenger; court held officer’s opinion that defendant was driving was proper lay witness testimony and not expert testimony).

Ishak v. McClennen, 241 Ariz. 364, 388 P.3d 1, ¶ 18 (Ct. App. 2016) (although state’s expert testified sample of defendant’s blood showed 26.9 ng/ml of THC, court held lay person could give opinion that defendant was not impaired by marijuana).

State v. King, 226 Ariz. 253, 245 P.3d 938, ¶ 13 (Ct. App. 2011) (during videotaped police interview and during trial testimony, witness was asked how hard defendant had kicked victim and then was asked to use chair to demonstrate how hard kick was; court held witness was not testifying as expert and was instead testifying based on witness’s own perceptions).

State v. Miller (Estrella), 226 Ariz. 202, 245 P.3d 887, ¶¶ 7–11 (Ct. App. 2010) (state’s witness had monitored and transcribed numerous wiretap recordings of conversations between defendant and persons connected with defendant, many of which were in Spanish; court held witness could authenticate law enforcement interview tapes and tapes of jailhouse telephone calls by identifying voices on tapes based on her experience with the monitoring and transcribing, and was not testifying as expert and was instead testifying based on witness’s own perceptions).

Boomer v. Frank, 196 Ariz. 55, 993 P.2d 456, ¶¶ 24–25 (Ct. App. 1999) (because witnesses’ opinions were based on their perceptions, trial court, in ruling on motion for summary judgment, could consider statements of witnesses who saw the vehicle before accident and opined that vehicle was exceeding posted speed limit and did not stop for stop sign).

State v. Tiscareno, 190 Ariz. 542, 950 P.2d 1163 (Ct. App. 1997) (victim permitted to testify that her nose was broken from being hit by defendant; a person does not have to be medical expert to testify that their nose is broken).

701.033 A lay witness may not give an opinion about the accuracy, reliability, or truthfulness of a particular person, or quantify the percentage of such persons who are truthful.

State v. Boggs, 218 Ariz. 325, 185 P.3d 111, ¶¶ 37–40 (2008) (during videotaped interrogation of defendant, detective accused defendant of lying; defendant claimed playing videotape to jurors violated his right to fair trial; court held that detective’s accusations were part of interrogation technique and not for purpose of giving opinion testimony at trial, thus no error).

701.035 If the testimony of two witnesses is contradictory and that could be the result of poor ability or opportunity to perceive, faulty memory, mistake, or poor ability to relate what happened, asking one witness in those situations whether the other witness is lying is improper, but when the only possible explanation for the inconsistent testimony is deceit or lying, or when one witness has opened the door by testifying about the veracity of the other witness, asking one witness whether the other witness is lying may be proper.

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State v. Canon, 199 Ariz. 227, 16 P.3d 788, ¶¶ 40–44 (Ct. App. 2000) (defendant claimed prosecutor acted improperly by asking him on cross-examination about differences between his testimony and officer’s testimony and asking him to comment on officer’s credibility; court held that, even if it assumed prosecutor’s questions constituted misconduct, it was not so pervasive or pronounced that trial lacked fundamental fairness).

State v. Morales, 198 Ariz. 372, 10 P.3d 630, ¶¶ 8–15 (Ct. App. 2000) (defendant’s testimony directly contradicted officers’ testimony, prosecutor asked defendant whether officers were lying, and defendant did not object; court held that, even assuming error, error was not fundamental).

701.040 A person may give an opinion of the value of property if the person is the owner or the equivalent, and any explanation of basis for the opinion goes to weight of the evidence.

City of Tucson v. Tanno, 245 Ariz. 488, 431 P.3d 202, ¶¶ 18–20 (Ct. App. 2018) (even though witness was owner of property, trial court did not abuse discretion in precluding testimony based on hypothetical comparison with increase values of stock in stock market).

Salt River Project v. Miller Park LLC, 216 Ariz. 161, 164 P.3d 667, ¶¶ 36–38 (Ct. App. 2007) (court rejected plaintiff’s claim that, in condemnation action, jurors should have based verdict only on experts’ valuation of property and should have disregarded owner’s testimony about value of property); *vac’d in part*, 218 Ariz. 246, 183 P.3d 497 (2008).

701.050 The opinion must assist the trier-of-fact in understanding the evidence or in determining a fact in issue, and not merely tell the trier-of-fact how to decide the case.

State v. Harrod, 200 Ariz. 309, 26 P.3d 492, ¶¶ 27–28 (2001) (in case-in-chief, defendant suggested ex-wife and her family were lying about his involvement in murder because of bitterness over divorce; court held this opened door and allowed state to call ex-wife in rebuttal to ask her why she had divorced defendant; ex-wife testified that she divorced him because he told her he had killed victim; court held this was not opinion testimony about defendant’s guilt).

Fuenning v. Superior Ct., 139 Ariz. 590, 680 P.2d 121 (1983) (in DUI case, officer should not be asked to give opinion whether defendant was intoxicated when driving, but may give opinion whether defendant showed symptoms of intoxication).

State v. Rhodes, 219 Ariz. 476, 200 P.3d 973, ¶ 13 (Ct. App. 2008) (court held that, when defendant is charged with sexual conduct with child, evidence of defendant’s sexual normalcy, or appropriateness in interacting with children, is character trait and one that pertains to charges of sexual conduct with child, and such testimony would not invade province of jurors).

State v. Campoy (Cordova), 214 Ariz. 132, 149 P.3d 756, ¶¶ 6–12 (Ct. App. 2006) (defendant charged with DUI; trial court abused discretion in ruling that state’s witnesses, when testifying about FSTs, could not use such terms as “field sobriety test,” “sobriety,” “tests,” “impairment,” “pass/fail,” or “marginal”).

State v. Herrera, 203 Ariz. 131, 51 P.3d 353, ¶¶ 7–8 (Ct. App. 2002) (while testifying about FSTs, officer stated, “I felt he was impaired to the slightest degree”; court held officer’s testimony was impermissible, but trial court did not err in denying motion for mistrial because trial court immediately struck officer’s testimony and gave detailed curative instruction, and in final instruction repeated that curative instruction and told jurors to disregard any stricken testimony).

State v. Lummus, 190 Ariz. 569, 950 P.2d 1190 (Ct. App. 1997) (court was concerned that officer testified that, on intoxication scale of 1 to 10, defendant was 10+, but held error was harmless beyond reasonable doubt).

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Rule 702. Testimony by Expert Witnesses.

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

- (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
- (b) the testimony is based on sufficient facts or data;
- (c) the testimony is the product of reliable principles and methods; and
- (d) the expert has reliably applied the principles and methods to the facts of the case.

Comment to 2012 Amendment

The 2012 amendment of Rule 702 adopts Federal Rule of Evidence 702, as restyled. The amendment recognizes that trial courts should serve as gatekeepers in assuring that proposed expert testimony is reliable and thus helpful to the jury's determination of facts at issue. The amendment is not intended to supplant traditional jury determinations of credibility and the weight to be afforded otherwise admissible testimony, nor is the amendment intended to permit a challenge to the testimony of every expert, preclude the testimony of experience-based experts, or prohibit testimony based on competing methodologies within a field of expertise. The trial court's gate keeping function is not intended to replace the adversary system. Cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.

A trial court's ruling finding an expert's testimony reliable does not necessarily mean that contradictory expert testimony is not reliable. The amendment is broad enough to permit testimony that is the product of competing principles or methods in the same field of expertise. Where there is contradictory, but reliable, expert testimony, it is the province of the jury to determine the weight and credibility of the testimony.

This comment has been derived, in part, from the Committee Notes on Rules—2000 Amendment to Federal Rule of Evidence 702.

Cases

702.001 Trial courts should serve as gatekeepers in assuring that proposed expert testimony is relevant and reliable and thus helpful to the jury's determination of facts at issue, but should not supplant traditional jury determinations of credibility and the weight to be afforded otherwise admissible testimony.

State v. Carlson, 237 Ariz. 381, 351 P.3d 1079, ¶¶ 22–29 (2015) (trial court precluded expert from testifying that defendant told him he falsely confessed and defendant's explanation why he did so; because (1) defendant's statements were inadmissible hearsay, (2) defendant never established that experts would have relied on such statements in forming opinion, and (3) allowing that testimony would have cloaked statements with implication that expert relied on them while shielding defendant from rigors of cross-examination, trial court did not abuse discretion in precluding that testimony).

702.003 A party offering testimony by an expert witness must show by a preponderance of the evidence that the testimony satisfies the requirements of this rule.

State v. Salazar-Mercado, 234 Ariz. 590, 325 P.3d 996, ¶ 13 (2014) (as proponent of Dr. Wendy Dutton's testimony, state had burden of establishing admissibility under Rule 702 by preponderance of evidence).

Sandretto v. Payson Health. Mgmt., 234 Ariz. 351, 322 P.3d 168, ¶ 15 (Ct. App. 2014) (plaintiff's expert witness was chief of pain medicine at UCLA Medical School, was professor of internal medicine and anesthesiology, and had extensive experience with Complex Regional Pain Syndrome (CRPS), a chronic pain condition caused by nerve injury).

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Glazer v. State, 234 Ariz. 305, 321 P.3d 470, ¶ 26 (Ct. App. 2014) (court examined testimony of plaintiff's expert witness and concluded trial court properly admitted testimony); ¶¶ 9–25 *vac'd*, 237 Ariz. 160, 347 P.3d 1141, ¶ 36 (2015).

State v. Bernstein (Herman et al.), 234 Ariz. 89, 317 P.3d 630, ¶ 10 (Ct. App. 2014) (opinion uses term “preponderance of the evidence” 13 times: ¶¶ 4, 10, 14, 15, 16, 19, 27); ¶¶ 19–28 *vac'd*, 237 Ariz. 226, 349 P.3d 200, ¶ 23 (2015).

702.004 In *Daubert*, the United States Supreme Court set forth several non-exclusive factors for courts to consider in determining whether scientific evidence is reliable: (1) whether the scientific methodology has been tested; (2) whether the methodology has been subjected to peer review; (3) the known or potential rate of error; (4) whether the methodology has general acceptance; and (5) the existence and maintenance of standards controlling the technique's operation; these factors may or may not be pertinent in assessing reliability, depending on the nature of the issue, the expert's particular expertise, and the subject of the testimony.

State v. Favela, 234 Ariz. 433, 323 P.3d 716, ¶ 8 (Ct. App. 2014) (court noted *Daubert* specifically rejected rigid “general acceptance” standard and instead set forth number of non-exclusive factors).

Sandretto v. Payson Health. Mgmt., 234 Ariz. 351, 322 P.3d 168, ¶ 13 (Ct. App. 2014) (court notes application of *Daubert* factors requires flexibility, particularly when applied to medical testimony, and further notes federal courts have cautioned against exclusion of medical testimony based on factors more relevant to product liability cases).

State ex rel. Montgomery v. Miller (Madrid), 234 Ariz. 289, 321 P.3d 454, ¶¶ 24–25 (Ct. App. 2014) (court notes no single factor is dispositive).

State v. Bernstein (Herman et al.), 234 Ariz. 89, 317 P.3d 630, ¶ 12 (Ct. App. 2014) (opinion cites several Arizona cases); ¶¶ 19–28 *vac'd*, 237 Ariz. 226, 349 P.3d 200, ¶ 23 (2015).

702.005 Because the current version of Rule 702 is not a new constitutional rule, it does not apply to trials that ended before the new rule became effective on January 1, 2012, thus *Daubert* and new Rule 702 does not apply to trial that ended before that date.

State v. Goudeau, 239 Ariz. 421, 372 P.3d 945, ¶¶ 144–46 (2016) (defendant contended trial court should have held *Daubert* hearing before admitting testimony of firearm examiner; because trial was in 2011, *Daubert* and new Rule 702 did not apply; because firearm examiner did not rely on any novel theory or process, it was not subject to *Frye*).

State v. Burns, 237 Ariz. 1, 344 P.3d 303, ¶¶ 63–65 (2015) (defendant claimed trial court should have held *Daubert* hearing; because trial ended in 2010, *Daubert* and new Rule 702 did not apply; defendant contended trial court should have precluded testimony of state's ballistics expert under *Frye*; because testimony did not rely on any novel theory or process, it was not subject to *Frye*).

702.006 Because Rule 702 of the Federal Rules of Evidence made no attempt to codify the *Daubert* factors, and because the 2012 amendment to Rule 702 of the Arizona Rules of Evidence adopted the text of the federal rule, the Arizona rule similarly does not codify the *Daubert* factors.

State v. Bernstein (Herman et al.), 234 Ariz. 89, 317 P.3d 630, ¶ 13 (Ct. App. 2014) (notes *Daubert* factors are discussed in context of Rule 702(c)); ¶¶ 19–28 *vac'd*, 237 Ariz. 226, 349 P.3d 200, ¶ 23 (2015).

702.007 In addition to the five non-exclusive factors identified by the United States Supreme Court in *Daubert*, courts have identified four other factors for courts to consider in determining whether scientific evidence is reliable: (1) whether the expert's testimony is prepared solely in anticipation of litigation or is based on independent research; (2) whether the expert's field of expertise/discipline is known to produce reliable results; (3) whether other courts have determined the expert's methodology is reliable; and (4) whether there are non-judicial uses for the expert's methodology/science.

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State ex rel. Montgomery v. Miller (Madrid), 234 Ariz. 289, 321 P.3d 454, ¶ 25 (Ct. App. 2014) (court cites *Kumho Tire* and two federal cases).

702.008 The trial court has discretion whether to set a pre-trial hearing to evaluate proposed expert testimony and may properly decide to hear the evidence and objections during the trial.

Stafford v. Burns, 241 Ariz. 474, 389 P.3d 76, ¶¶ 28–30 (Ct. App. 2017) (plaintiffs brought claims for medical malpractice and wrongful death after their son died of methadone overdose; plaintiffs moved to preclude any expert testimony extrapolating timing of son’s last methadone injection based on son’s post-mortem gastric methadone levels, claiming this was based on “junk science”; court noted both parties presented lengthy and detailed pleadings, cited supporting literature, and attached affidavits containing specific opinions of their other disclosed medical and pharmacological experts, and concluded trial court did not abuse discretion in not holding pre-trial hearing).

State v. Favela, 234 Ariz. 433, 323 P.3d 716, ¶ 11 (Ct. App. 2014) (court cited *Perez* for proposition that “trial court has broad discretion to determine the reliability of evidence and need not conduct a hearing to make a *Daubert* decision”).

Sandretto v. Payson Health. Mgmt., 234 Ariz. 351, 322 P.3d 168, ¶ 17 (Ct. App. 2014) (court noted defendant did not appear to have requested pre-trial hearing, but even if it had, court had no reason to conclude trial court abused its discretion to defer hearing objections until trial).

Glazer v. State, 234 Ariz. 305, 321 P.3d 470, ¶ 28 (Ct. App. 2014) (court noted parties provided trial court with voluminous written pre-trial submissions and that trial court held evidentiary hearing during trial outside presence of jurors for plaintiff’s expert witness, and held trial court did not abuse discretion in denying defendant’s request for pre-trial hearing); ¶¶ 9–25 *vac’d*, 237 Ariz. 160, 347 P.3d 1141, ¶ 36 (2015).

State v. Perez, 233 Ariz. 38, 308 P.3d 1189, ¶¶ 15–20 (Ct. App. 2013) (defendant contended trial court erred in not allowing him to present evidence about polygraph’s reliability; court stated trial court has broad discretion whether to hold pre-trial hearing, and further noted defendant did not claim polygraphs had improved or changed since 2001 when Arizona Supreme Court held testimony about polygraph tests was inadmissible absent stipulation of parties).

Arizona State Hospital v. Klein, 231 Ariz. 467, 296 P.3d 1003, ¶ 31–32 (Ct. App. 2013) (court notes, particularly when trial is to trial court rather than to jurors, trial court may decide to hear evidence and objections at trial and not hold separate hearing, but trial court did not abuse discretion in holding pre-trial hearing, even though this was matter to be resolved by trial court and not by jurors).

702.009 Although the trial court may be required to make findings about admissibility of evidence when it excludes evidence, the trial court is not required to make findings about admissibility of evidence when it admits evidence.

Glazer v. State, 234 Ariz. 305, 321 P.3d 470, ¶ 29–30 (Ct. App. 2014) (court encourages trial courts to make findings when addressing pre-trial challenges under Rule 702); ¶¶ 9–25 *vac’d*, 237 Ariz. 160, 347 P.3d 1141, ¶ 36 (2015).

702.010 A witness may be qualified as an expert by training or education.

State v. Romero, 239 Ariz. 6, 365 P.3d 358, ¶¶ 13–16 (2016) (court concluded trial court abused discretion in finding witness whose expertise was in experimental design was not qualified to give opinion on field of firearm identification, and remanded for determination whether error was harmless).

State v. Lee(II), 189 Ariz. 608, 944 P.2d 1222 (1997) (officer had 21 years with department and 15 years as homicide detective, training in ballistics and reconstruction of human remains, courses at FBI Forensic Art School and composite art, and introductory and advanced courses in blood spatter; trial court did not abuse discretion in finding detective qualified as blood-spatter expert).

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State v. Hughes, 189 Ariz. 62, 938 P.2d 457 (1997) (witness had been in Army for 25 years, and had received training in Vietnam and military interrogations schools; trial court did not err in determining witness qualified as expert in restraint methods).

- * *Lebn v. Al-Tanayyan*, 246 Ariz. 277, 438 P.3d 646, ¶¶ 23–25 (Ct. App. 2019) (father contended trial court abused discretion by relying on expert’s testimony because expert relied on information from mother, unidentified international law experts, and governmental informational sources; expert testified he worked exclusively on international family law matters, including international child custody matters, international child abduction prevention, and recovery of internationally abducted children; testified his opinions were based on his extensive experience and research, including official statements and information about Kuwaiti law from United States Department of State, United Kingdom, and non-governmental organizations that provide information relating to international child abductions; expert further testified he had gained knowledge about international child custody disputes, written several articles and two treatises on subject, and provided expert testimony in United States and internationally; court held trial court did not abuse discretion in relying on expert’s testimony).

State v. Romero, 240 Ariz. 504, 381 P.3d 297, ¶¶ 4–22 (Ct. App. 2016) (upon remand, court concluded error in precluding expert witness testimony was not harmless).

Glazer v. State, 234 Ariz. 305, 321 P.3d 470, ¶¶ 31–32 (Ct. App. 2014) (plaintiff contended State was negligent in not installing median barrier; State contended plaintiff’s expert witness was not qualified to testify on standard of care on need to install median barriers because he had no highway design experience; court noted plaintiff’s expert witness had Ph.D. in transportation engineering; master’s degree in traffic engineering; bachelor’s degree in civil engineering and a “certificate of highway transportation,” which he described as equivalent of another master’s degree; court concluded trial court did not abuse its discretion in finding plaintiff’s expert witness was qualified under Rule 702(a) to testify as a standard of care expert), ¶¶ 9–25 *vac’d*, 237 Ariz. 160, 347 P.3d 1141, ¶ 36 (2015).

Escamilla v. Cuello, 230 Ariz. 202, 282 P.3d 403, ¶¶ 18–23 (Ct. App. 2012) (expert witness testified candidate did not have sufficient English language proficiency to fulfill duties as member of city council; candidate contested expert witness’s qualifications; court reviewed expert witness’s training education, knowledge, experience, and testing methods, and concluded trial court did not abuse discretion in admitting expert witness’s testimony).

State v. Speers, 209 Ariz. 125, 98 P.3d 560, ¶ 15 (Ct. App. 2004) (defendant charged with sexual exploitation of minors; trial court admitted as propensity evidence testimony from two second-grade students of alleged misconduct with them; court held expert witness had necessary qualification to testify about suggestive interview techniques, thus trial court erred in precluding this evidence).

State v. Scott, 187 Ariz. 474, 930 P.2d 551 (Ct. App. 1996) (criminalist permitted to testify about “green leafy substance” based on FBI and DEA training).

702.020 A witness may be qualified as an expert by knowledge, skill, or experience.

State v. Romero, 239 Ariz. 6, 365 P.3d 358, ¶¶ 13–16 (2016) (court concluded trial court abused discretion in finding witness whose expertise was in experimental design was not qualified to give opinion on field of firearm identification, and remanded for determination whether error was harmless).

State v. Salazar-Mercado, 234 Ariz. 590, 325 P.3d 996, ¶ 12 (2014) (defendant did not contest Dr. Wendy Dutton’s qualifications).

Engstrom v. McCarthy, 243 Ariz. 469, 411 P.3d 653, ¶ 27 (Ct. App. 2018) (expert witness was licensed psychologist who had undergone years of training and served as an expert witness in dozens of cases, and had interviewed all relevant parties and reached his expert opinion based on interviews he conducted and facts he learned from those interviews; court held trial court did not abuse its discretion by allowing expert to testify and give his opinions).

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- * *State v. Murray (Easton)*, 247 Ariz. 447, 451 P.3d 803, ¶¶ 13–14 (Ct. App. 2019) (after testifying about his experience and knowledge of local marijuana trade, detective testified, without objection, that evidence he saw was consistent with shipping practices common to that trade; on appeal, defendant contended state had not established detective was qualified as expert; court noted detective testified to extensive experience that would have qualified him as expert, including participation in several hundred drug-trafficking investigations, and thus was qualified to give expert opinion).

State v. Romero, 240 Ariz. 504, 381 P.3d 297, ¶¶ 4–22 (Ct. App. 2016) (upon remand, court concluded error in precluding expert witness testimony was not harmless).

State v. Foshay, 239 Ariz. 271, 370 P.3d 618, ¶¶ 9–12 (Ct. App. 2016) (witness had working knowledge of how 3–D confocal microscopy functioned, and although he did not have personal knowledge how mapping software functioned, that did not affect his knowledge and experience with process).

Preston v. Amadei, 238 Ariz. 124, 357 P.3d 720, ¶¶ 30–37 (Ct. App. 2015) (plaintiff's expert witness had been board-certified in internal medicine since 1977 and board-certified in cardiology since 1991; trial court did not abuse discretion in finding expert witness's extensive practice was sufficient to qualify him as expert witness).

Felipe v. Theme Tech Corp., 235 Ariz. 520, 334 P.3d 210, ¶¶ 12–19 (Ct. App. 2014) (because investigating officer described various accident reconstruction methods and his own opinions of speeds of vehicles based on his reconstruction, he testified as expert; court held “independent expert” under Rule 26(b)(4)(D) is person retained for purpose of offering expert testimony; because officer was not retained by plaintiffs, he was not plaintiffs' one independent expert).

Glazer v. State, 234 Ariz. 305, 321 P.3d 470, ¶¶ 31–32 (Ct. App. 2014) (plaintiff contended State was negligent in not installing median barrier to prevent crossover collisions; State contended plaintiff's expert witness was not qualified to testify on standard of care on need to install median barriers because he had no highway design experience; court noted plaintiff's expert witness had been transportation engineer for more than 45 years; had worked as traffic engineer with Utah State Department of Highways; served as Deputy Utah State Traffic Engineer and as Assistant Director of Bureau of Highway Traffic program at Pennsylvania State University; had spent 16 years teaching highway and traffic engineering at Yale and Penn State Universities and University of New Mexico; was Fellow and lifetime member of Institute of Transportation Engineers; was member of National Society of Professional Engineers and was affiliated with Transportation Research Board; court concluded trial court did not abuse its discretion in finding plaintiff's expert witness was qualified under Rule 702(a) to testify as standard of care expert); *vac'd*, 237 Ariz. 160, 347 P.3d 1141, ¶ 36 (2015).

State v. Buccheri-Bianca, 233 Ariz. 324, 312 P.3d 123, ¶ 28 (Ct. App. 2013) (court relied on its discussion in *State v. Salazar-Mercado* to uphold admission of testimony by Wendy Dutton).

State v. Delgado, 232 Ariz. 182, 303 P.3d 76, ¶¶ 9–12 (Ct. App. 2013) (defendant claimed state's “strangulation expert” had no specialized training in strangulation; expert was medical doctor with extensive emergency medicine experience and had expertise on process body undergoes during strangulation; court held trial court did not abuse discretion in concluding state's witness qualified as expert).

McMurtry v. Weatherford Hotel Inc., 231 Ariz. 244, 293 P.3d 520, ¶¶ 14–18 (Ct. App. 2013) (defendant contended witness's opinions should be excluded because he was not qualified as expert due to lack of specialized knowledge or experience with hotel safety, fire and building code compliance, or architectural design of historic hotels; court stated degree of qualification goes to weight and not admissibility of testimony and held witness had sufficient relevant experience to qualify as expert; court noted case was tried under old version of Rule 702, and stated it did not believe amendments to Rule 702 would change outcome on facts presented, and noted Comment explained 2012 amendment was “not intended to prevent expert testimony based on experience”; court stated trial court's gatekeeping function was not intended to replace adversary system).

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Escamilla v. Cuello, 230 Ariz. 202, 282 P.3d 403, ¶¶ 18–23 (Ct. App. 2012) (expert witness testified candidate did not have sufficient English language proficiency to fulfill duties as member of city council; candidate contested expert witness’s qualifications; court reviewed expert witness’s training education, knowledge, experience, and testing methods, and concluded trial court did not abuse discretion in admitting expert witness’s testimony).

State v. Davolt, 207 Ariz. 191, 84 P.3d 456, ¶¶ 71–72 (2004) (because witness had been involved with DNA evidence since 1986 and had extensive training and experience in field, she was more qualified than ordinary juror, thus trial court did not abuse discretion in admitting her expert testimony).

State v. Davolt, 207 Ariz. 191, 84 P.3d 456, ¶¶ 73–75 (2004) (detective attended classes on crime scene management and homicide investigation, and had watched videos on blood spatter analysis, training was more extensive than ordinary juror; trial court did not abuse discretion in admitting testimony).

State v. Lee(II), 189 Ariz. 608, 944 P.2d 1222 (1997) (officer had 21 years with department and 15 years as homicide detective, training in ballistics and reconstruction of human remains, courses at FBI Forensic Art School and composite art, and introductory and advanced courses in blood spatter; trial court did not abuse discretion in finding detective qualified as blood-spatter expert).

State v. Hughes, 189 Ariz. 62, 938 P.2d 457 (1997) (witness was 25 year Army veteran, worked in various capacities with prisoners and detainees, and had seen hundreds of people tied with ropes; trial court did not err in determining witness qualified as expert in restraint methods).

State v. Speers, 209 Ariz. 125, 98 P.3d 560, ¶ 15 (Ct. App. 2004) (defendant charged with sexual exploitation of minors; trial court admitted as propensity evidence testimony from two second-grade students of alleged misconduct with them; court held expert witness had necessary qualification to testify about suggestive interview techniques, thus trial court erred in precluding this evidence).

State v. Scott, 187 Ariz. 474, 930 P.2d 551 (Ct. App. 1996) (criminalist permitted to testify about “green leafy substance” based on 14 years experience).

702.030 To qualify as an expert, a witness need not have the highest possible qualifications or highest degree of skill or knowledge, and the trial court should construe liberally whether the witness is qualified as an expert; all the witness need have is a skill or knowledge superior to that of persons in general, and the level of skill or knowledge affects the weight of the testimony and not its admissibility.

State v. Carlson, 237 Ariz. 381, 351 P.3d 1079, ¶¶ 30–31 (2015) (because expert’s expertise was in general area of false confession and had no expertise or experience in area of false confessions to media, trial court precluded expert from testifying about risk factors that would tend to make defendant confess falsely when he spoke to media; court held this lack of specific expertise went to weight of the testimony and not its admissibility; trial court nonetheless did not abuse discretion in precluding that testimony because testimony went to defendant’s general propensity to lie rather than to mental and physical circumstances affecting voluntariness of confession).

State v. Davolt, 207 Ariz. 191, 84 P.3d 456, ¶¶ 69–75 (2004) (because witness had been involved with DNA evidence since 1986 and had extensive training and experience in field, she was more qualified than ordinary juror, and because detective had attended classes on crime scene management and homicide investigation, and had watched two videos on blood spatter analysis, his training, although not extensive, was more extensive than ordinary juror, thus both were qualified as expert witnesses; the degree of qualification went to weight of testimony and not admissibility).

State v. Delgado, 232 Ariz. 182, 303 P.3d 76, ¶¶ 9–12 (Ct. App. 2013) (defendant contended state’s “strangulation expert” had no specialized training in strangulation; court said whether witness is qualified as expert should be construed liberally; expert was medical doctor with extensive experience working in emergency medicine and had expertise on physical process body undergoes during strangulation; trial court did not abuse discretion in concluding state’s witness qualified as expert).

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McMurtry v. Weatherford Hotel Inc., 231 Ariz. 244, 293 P.3d 520, ¶¶ 14–18 (Ct. App. 2013) (defendant contended witness's opinions should be excluded because he was not qualified as expert due to lack of specialized knowledge or experience with hotel safety, fire and building code compliance, or architectural design of historic hotels; court stated degree of qualification goes to weight and not admissibility of testimony and held witness had sufficient relevant experience to qualify as expert; court noted case was tried under old version of Rule 702, and stated it did not believe amendments to Rule 702 would change outcome on facts presented, and noted Comment explained 2012 amendment was not intended to prevent expert testimony based on experience; court stated trial court's gatekeeping function was not intended to replace adversary system).

Webb v. Omni Block Inc., 216 Ariz. 349, 166 P.3d 140, ¶¶ 7–10 (Ct. App. 2007) (plaintiff claimed witness's experience and training were not sufficient to qualify him as expert beyond responsibilities of general contractor, thus he should not have been allowed to testify about subcontractors; court found no error and stated degree of qualification went to weight and not admissibility of testimony).

Perguson v. Tamis, 188 Ariz. 347, 937 P.2d 347 (Ct. App. 1996) (although doctor expert witness from Colorado acknowledged he was not familiar with law or standard of care applicable to physician assistants or their scope of practice in Arizona, because he was qualified to supervise physician assistant, he should have been allowed to give opinion whether physician assistant was negligent, and any deficiencies would go to weight).

State v. Curry, 187 Ariz. 623, 931 P.2d 1133 (Ct. App. 1996) (expert witness did not have to be licensed psychiatrist or psychologist to give opinion based on child sexual abuse accommodation syndrome).

702.040 The witness's specialty affects the weight of the testimony and not its admissibility, thus the witness does not necessarily need to have the same specialty as the area that is the subject of the litigation.

State v. Villalobos, 225 Ariz. 74, 235 P.3d 227, ¶¶ 24–27 (2010) (medical examiner testified during aggravation stage that victim had suffered “excruciating” pain when defendant beat her; defendant contended medical examiner was not qualified to testify on subject of pain levels because he was certified only in pathology and had not ascertained a patient's pain level for 10 years; court held these matters went to weight and not admissibility of testimony).

Lobmeier v. Hammer, 214 Ariz. 57, 148 P.3d 101, ¶¶ 26–29 (Ct. App. 2006) (expert witness was biomechanical engineer; plaintiff contended that, because expert witness was not medical doctor, had no medical training to diagnose injuries, and did not personally examine plaintiff, trial court should not have allowed expert witness to testify that rear-end collision did not cause plaintiff's injuries; court held trial court did not err allowing expert witness to testify).

Perguson v. Tamis, 188 Ariz. 347, 937 P.2d 347 (Ct. App. 1996) (although Colorado expert witness acknowledged he was not familiar with standard of care applicable to physician assistants or their scope of practice in Arizona, because he was qualified to supervise physician assistant, he should have been allowed to give opinion whether physician assistant was negligent).

702.045 A trial court should not preclude an expert's testimony without allowing the party to make an offer of proof.

State v. Carlson, 237 Ariz. 381, 351 P.3d 1079, ¶ 24 (2015) (defendant filed memorandum describing expert's testimony; when trial court disallowed that testimony, defendant asked to supplement offer of proof, but trial court denied request; court stated that supplemental offer would have aided its evaluation of trial court's decision, but was able to resolve issue on record presented).

702.050 When a party seeks to have a witness testify as an expert and the trial court determines that the witness so qualifies, the trial court should not declare in front of the jurors that the witness is an expert because this may give the appearance that the trial court is endorsing that witness's testimony and may be considered a comment on the evidence.

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State v. McKinney & Hedlund, 185 Ariz. 567, 585–86, 917 P.2d 1214, 1232–33 (1996) (after prosecutor elicited testimony about witness’s qualifications, prosecutor stated to trial court he was submitting witness as an expert, and trial court said prosecutor could proceed).

702.055 Credibility and weight are for determination by the jurors unassisted by the judge; admissibility is for determination by the judge unassisted by the jurors.

State v. Lehr, 201 Ariz. 509, 38 P.3d 1172, ¶ 29 (2002) (opinion makes statement).

State v. Clemons, 110 Ariz. 555, 556–57, 521 P.2d 987, 988–89 (1974) (“No rule is better established than that the credibility of the witnesses and the weight and value to be given to their testimony are questions exclusively for the jury.”).

Sandretto v. Payson Health. Mgmt., 234 Ariz. 351, 322 P.3d 168, ¶ 24 (Ct. App. 2014) (court noted trial court’s “gatekeeping function ought not to be confused with the jury’s responsibility to separate wheat from chaff”).

State v. Bernstein (Herman et al.), 234 Ariz. 89, 317 P.3d 630, ¶ 8 (Ct. App. 2014) (court noted comment to Rule 702 for 2012 Amendments stated changes are “not intended to supplant traditional jury determinations of credibility”); ¶¶ 19–28 *vac’d*, 237 Ariz. 226, 349 P.3d 200, ¶ 23 (2015).

702.060 The trier-of-fact is entitled to consider an expert witness’s opinion and may believe all, some, or none of the testimony, even though it is uncontradicted, and may give it only the weight to which it deems the opinion is entitled.

State v. Gomez, 211 Ariz. 111, 118 P.3d 626, ¶¶ 13–14 (Ct. App. 2005) (because trial court instructed jurors that they must determine facts from evidence presented, which consisted of testimony of experts and exhibits, and because trial court instructed jurors that they were not bound by expert testimony and should only give it weight it deserved, trial court did not abuse discretion in refusing defendant’s requested instruction that they could conduct their own examination of any evidence that had been admitted in evidence).

702.065 Although trial courts should serve as gatekeepers in assuring that proposed expert testimony is reliable and thus helpful to the jury’s determination of facts at issue, when the parties present experts with conflicting opinions, the jurors are to determine weight and credibility of testimony and decide between competing methodologies within field of expertise, and trial court is not to use its “gatekeeping” function as a guise to supplant the traditional duty of jurors to resolve conflicts.

State v. Salazar-Mercado, 234 Ariz. 590, 325 P.3d 996, ¶ 9 (2014) (although amended rule imposes “gatekeeper” obligation on trial judges to admit only relevant and reliable expert testimony, amendment did not alter venerable practice of permitting experts to educate fact finder about general principles, without ever attempting to apply these principles to specific facts of case).

In re Estate of Reinen, 198 Ariz. 283, 9 P.3d 314, ¶¶ 9–12 (2000) (in medical malpractice case, trial court granted directed verdicts in favor of nurse and one doctor because second doctor testified that he would not have changed course of his treatment even if nurse and doctor had acted differently; because jurors were not obligated to believe testimony of testifying doctor, trial court erred in granting motion for directed verdict).

Sandretto v. Payson Health. Mgmt., 234 Ariz. 351, 322 P.3d 168, ¶¶ 21–23 (Ct. App. 2014) (defendant contended plaintiff’s expert’s causation opinion was “medical mumbo-jumbo” and “rank speculation”; defendant did not, however, present to trial court scientific literature undermining reliability or application of plaintiff’s expert’s causation opinion, and instead relied on two medical information sheets from Internet, which included disclaimers that information could not be used for diagnosis or treatment of any medical treatment; court noted that, when properly qualified physician with expertise in recognized medical condition opines on cause of condition in particular patient based on examination and testing, such testimony is admissible unless opponent proffers scientific evi-

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dence challenging reliability of underlying principles and application, and that reliance on internet-based general medical information with disclaimers against using information for medical diagnosis and treatment does not satisfy this requirement).

Sandretto v. Payson Health. Mgmt., 234 Ariz. 351, 322 P.3d 168, ¶ 24 (Ct. App. 2014) (court noted trial court's "gatekeeping function ought not to be confused with the jury's responsibility to separate wheat from chaff," and held that jurors were properly allowed to evaluate differing opinions of experts based on reasons given for them, thus trial court did not abuse discretion by admitting plaintiff's expert's diagnosis of CRPS and his causation opinion).

Glazer v. State, 234 Ariz. 305, 321 P.3d 470, ¶ 40 (Ct. App. 2014) (plaintiff claimed State was negligent in not installing median barrier to prevent crossover collisions; court noted State vigorously challenged plaintiff's expert's testimony on cross-examination and presented its own expert to counter plaintiff's expert; court concluded trial court did not abuse its discretion in admitting testimony from plaintiff's expert witness); ¶¶ 9–25 *vac'd*, 237 Ariz. 160, 347 P.3d 1141, ¶ 36 (2015).

State ex rel. Montgomery v. Miller (Madrid), 234 Ariz. 289, 321 P.3d 454, ¶ 20 (Ct. App. 2014) (jurors are to determine weight and credibility of testimony and decide between competing methodologies within field of expertise).

702.070 The trier-of-fact is entitled to make an independent evaluation of the facts and evidence that support the expert's opinion.

State v. Gomez, 211 Ariz. 111, 118 P.3d 626, ¶¶ 10–12 (Ct. App. 2005) (trial court did not abuse its discretion in refusing defendant's request that jurors be given magnifying glass to use to examine fingerprint cards admitted in evidence).

State v. Ochoa, 189 Ariz. 454, 943 P.2d 814 (Ct. App. 1997) (although officer testified he did not know whether shooting was gang-related or committed to benefit or advance any specific goal of the gang, this did not preclude jurors from finding shooting was gang-related).

702.080 The trial court had discretion in what to allow for the jurors to use in examining the items admitted in evidence.

State v. Gomez, 211 Ariz. 111, 118 P.3d 626, ¶¶ 10–12 (Ct. App. 2005) (trial court did not abuse its discretion in refusing defendant's request that jurors be given magnifying glass to use to examine fingerprint cards admitted in evidence).

702.090 All references to polygraph tests are inadmissible for any purpose in Arizona, absent a stipulation of the parties, and nothing indicates any change in polygraph technology that would require the court to reconsider that issue under *Daubert*.

State v. Hoskins, 199 Ariz. 127, 14 P.3d 977, ¶¶ 68–69 (2001) (witness had been willing to take polygraph test, and defendant sought to ask officers why they did not give witness polygraph test, contending this showed officers did not consider witness to be reliable; court held any testimony about polygraph tests was inadmissible, and declined invitation to revisit this area of law).

State v. Perez, 233 Ariz. 38, 308 P.3d 1189, ¶¶ 15–20 (Ct. App. 2013) (defendant sought to introduce results of polygraph because he considered them favorable).

702.100 For expert testimony to be admissible, the witness must be qualified as an expert by knowledge, skill, experience, training, or education, and (a) the expert's scientific, technical, or other specialized knowledge must help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.

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State v. Bernstein (Herman et al.), 237 Ariz. 226, 349 P.3d 200, ¶¶ 10, 13, 21 (2015) (evidence showed gas chromatograph properly analyzed sample from each defendant; court held record showed state established by preponderance of evidence that criminalist reliably applied principles and methods to facts of case; fact that gas chromatograph did not properly analyze samples from other defendants did not affect application of principles and methods to sample from each defendant).

Rasor v. Northwest Hospital LLC, 244 Ariz. 423, 419 P.3d 956, ¶¶ 19–25 (Ct. App. 2018) (expert witness had been registered nurse for more than 20 years, 9 years in coronary care unit of an acute-care hospital, was cross-trained for ICU, and had experience working with patients recovering from open-heart surgery; was hospital director of wound care at long-term, acute-care hospital for 2 years; her role at that hospital included admission assessments, weekly re-assessments, and care planning; she provided treatments and collaborated with physicians and others for plan and care for patients; she had reviewed plaintiff's medical records, hospital's policies for preventing pressure ulcers, and information from nurses regarding their interaction with plaintiff; court held witness was qualified as expert, and any deficiencies in her review of facts of case went to weight not admissibility).

Paragraph (a) — Assist trier of fact.

702.a.010 A witness who is qualified as an expert may testify in the form of an opinion or otherwise if the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue.

State v. Escalante-Orozco, 241 Ariz. 254, 386 P.3d 798, ¶¶ 56–58 (2017) (court noted requirement that evidence be “helpful” to jurors “goes primarily to relevance,” and held Y–STR results were helpful to jurors).

State v. Salazar-Mercado, 234 Ariz. 590, 325 P.3d 996, ¶¶ 14–15 (2014) (because Dr. Wendy Dutton's testimony might have helped jurors understand possible reasons for delayed and inconsistent reporting in this case, her testimony satisfied subsection (a)).

In re Estate of Pouser, 193 Ariz. 574, 975 P.2d 704, ¶¶ 15 (1999) (outcome of will contest depended on “transitional rule,” which related to wills drafted prior to changes in federal tax statutes; testimony of tax attorney of effect of federal statutes was thus admissible).

Ponce v. Parker Fire Dist., 234 Ariz. 380, 322 P.3d 197, ¶¶ 14–20 (Ct. App. 2014) (neighbor's house burned, and after extinguishing fire, fire department personnel used thermal imaging on exterior of Ponce's house and conducted visual inspection of interior; 5 days later, Ponce's house was almost completely destroyed by fire; Ponce contended fire department was negligent in not using thermal imaging on interior of his house; court noted expert testimony is necessary to prove professional negligence when matter at issue is not within knowledge of average person and that jurors would have to determine whether fire department met standard, thus testimony of expert witness would assist jurors in making that determination).

Sandretto v. Payson Health. Mgmt., 234 Ariz. 351, 322 P.3d 168, ¶ 9 (Ct. App. 2014) (testimony of plaintiff's two expert witnesses permitted jurors to construct cause-and-effect time line regarding MRSA, multiple surgeries, and CRPS).

State ex rel. Montgomery v. Miller (Madrid), 234 Ariz. 289, 321 P.3d 454, ¶ 28 (Ct. App. 2014) (defendant did not challenge qualifications of state's expert on retrograde analysis, and court held that testimony would assist the jurors).

State v. Bernstein (Herman et al.), 234 Ariz. 89, 317 P.3d 630, ¶ 14 (Ct. App. 2014) (court held record fully supported trial court's finding that state showed by preponderance of evidence that criminalist's scientific and technical knowledge about Scottsdale Crime Lab's relevant and would assist trier of fact in understanding evidence); ¶¶ 19–28 *vac'd*, 237 Ariz. 226, 349 P.3d 200, ¶ 23 (2015).

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State v. Delgado, 232 Ariz. 182, 303 P.3d 76, ¶¶ 13–17 (Ct. App. 2013) (defendant contended state’s “strangulation expert” was not helpful to jurors because “[a] person does not need to be a doctor to listen to a person’s [allegation they have been strangled], which may or may not be true”; stated contended expert witness’s testimony would assist jurors in determining whether victim’s injuries were consistent with her story; court held trial court did not abuse discretion in allowing state’s witness to testify as expert).

Arizona State Hospital v. Klein, 231 Ariz. 467, 296 P.3d 1003, ¶¶ 11–24 (Ct. App. 2013) (court held Rule 702 applied to discharge proceeding under A.R.S. § 36–3714).

State v. Sosnowicz, 229 Ariz. 90, 270 P.3d 917, ¶¶ 15–26 (Ct. App. 2012) (defendant drove his vehicle over victim, and claimed it was accident; state claimed defendant either intentionally, knowingly, or recklessly drove over victim; medical examiner testified manner of death was homicide; because medical examiner’s opinion was based on information he had received from police officers and not on any specialized knowledge or personal examination of body, court held that testimony essentially was ultimate issue in case and did not assist jurors in determining case, thus trial court should not have admitted that testimony, but any error was harmless).

State v. Fornof, 218 Ariz. 74, 179 P.3d 954, ¶¶ 20–21 (Ct. App. 2008) (officer testified that defendant had 43 grams of cocaine base that was worth \$4,360, cash in predominately \$20 bills, and no means of smoking that cocaine; trial court did not err in allowing expert witness to testify based on that evidence that defendant possessed the cocaine for sale rather than personal use).

State v. Speers, 209 Ariz. 125, 98 P.3d 560, ¶¶ 20–25 (Ct. App. 2004) (defendant was charged with 18 counts of sexual exploitation of minors based on computer images; trial court admitted as propensity evidence testimony from two second-grade students of alleged misconduct with them; court held testimony from expert witness about suggestive interview techniques was admissible because lay jurors may be unfamiliar with those techniques, thus trial court erred in precluding this evidence).

In re Ubaldo, 206 Ariz. 543, 81 P.3d 334, ¶¶ 8–13 (Ct. App. 2003) (because charge of criminal damage under A.R.S. § 13–1602(A)(5) requires proof that defendant drew or inscribed marks that were capable of conveying some meaning, communication, or information, state may have to present expert to testify whether marks that defendant made were such that they conveyed some meaning, communication, or information).

Hutcherson v. City of Phoenix, 188 Ariz. 183, 933 P.2d 1251 (Ct. App. 1996) (victim played for Phoenix Cardinals; sports agent properly permitted to give opinion of victim’s potential earnings).

State v. Curry, 187 Ariz. 623, 931 P.2d 1133 (Ct. App. 1996) (expert witness testified about generally shared characteristics of child sexual abuse victims, explaining such phenomena as secrecy, helplessness, coping mechanisms, response to abuse, and “script memory,” described familiar patterns of disclosure by victims to others, and described common techniques used by perpetrators to keep victims from disclosing abuse to others).

State v. Carreon, 151 Ariz. 615, 617, 729 P.2d 969, 971 (Ct. App. 1986) (officer permitted to give opinion that, based on way defendant carried cocaine and money, drugs were possessed for sale).

702.a.020 When a matter is of such common knowledge that a lay person could reach as intelligent a conclusion as an expert, the trial court should preclude expert opinion.

State v. Nordstrom, 200 Ariz. 229, 25 P.3d 717, ¶¶ 33–34 (2001) (sketch artist testified about eyewitness’s description of suspect and satisfaction with resulting drawing; because sketch artist was no more qualified than jurors in determining whether eyewitness’s description of suspect matched defendant’s photograph, trial court properly precluded that testimony).

State v. Ortiz, 238 Ariz. 329, 360 P.3d 125, ¶ 11 (Ct. App. 2015) (court rejected defendant’s contention that, in today’s society, much of Dr. Wendy Dutton’s testimony was common knowledge).

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State v. Randles, 235 Ariz. 547, 334 P.3d 730, ¶¶ 11–19 (Ct. App. 2014) (because effects of alcohol consumption is within common knowledge and experience of most jurors, trial court properly precluded testimony from defendant’s expert on effects of alcohol consumption).

Crackel v. Allstate Ins. Co., 208 Ariz. 252, 92 P.3d 882, ¶ 44 (Ct. App. 2004) (because jurors are capable of determining whether legal process was used improperly, expert testimony not required).

702.a.030 Merely because the expert is testifying as a “cold” witness does not mean that witness’s testimony will not assist the jurors in determining a fact in issue.

State v. Haskie, 242 Ariz. 582, 399 P.3d 657, ¶ 12 (2017) (*Salazar-Mercado’s* rationale for cases involving child-victims applies equally to cases involving adult-victims).

State v. Salazar-Mercado, 234 Ariz. 590, 325 P.3d 996, ¶¶ 14–15 (2014) (court rejected defendant’s contention that trial court abused discretion in allowing Wendy Dutton to testify about general characteristics of child victims of sexual abuse without applying that testimony to facts of case).

State v. Ortiz, 238 Ariz. 329, 360 P.3d 125, ¶¶ 2–8 (Ct. App. 2015) (defendant was 53 and victim’s wrestling coach; victim was 15; Dr. Wendy Dutton testified as “cold” witness).

State v. Buccheri-Bianca, 233 Ariz. 324, 312 P.3d 123, ¶ 29 (Ct. App. 2013) (court relied on its discussion in *State v. Salazar-Mercado* to uphold admission of testimony by Wendy Dutton).

State v. Buccheri-Bianca, 233 Ariz. 324, 312 P.3d 123, ¶¶ 26–27 (Ct. App. 2013) (court again rejected defendant’s claim that trial court abused discretion in allowing Wendy Dutton to testify about general characteristics of child victims of sexual abuse without applying that testimony to facts of case).

702.a.035 Profile evidence tends to show that a defendant possesses one or more of an informal compilation of characteristics or an abstract of characteristics typically displayed by persons engaged in a particular kind of activity; while the state may not offer profile evidence as substantive proof of the defendant’s guilt, the state may offer expert testimony that explains a victim’s seemingly inconsistent behavior in order to aid jurors in evaluating the victim’s credibility, and the more general the proffered testimony, the more likely it will be admissible, while the more the testimony is tied to the defendant’s characteristics, rather than to those of the victim, the more likely the admission of such testimony will be impermissibly prejudicial.

State v. Haskie, 242 Ariz. 582, 399 P.3d 657, ¶¶ 14–22 (2017) (victim gave written statement to police stating defendant had beaten and strangled her; prior to trial, victim denied that defendant had assaulted her; state’s expert witness on domestic violence testified as “cold” expert; in this case, victim’s behavior and inconsistent statements were squarely at issue, and testimony was limited to questions designed to help jurors understand sometimes counterintuitive behaviors of domestic violence victims; court concluded witness did not engage in offender profiling, but said trial courts should exercise great caution in admitting this type of evidence).

State v. Ketchner, 236 Ariz. 262, 339 P.3d 645, ¶¶ 14–19 (2014) (expert witness testified about characteristics common to domestic violence victims and their abusers, and described risk factors for “lethality” in abusive relationship; court held testimony was inadmissible because, in addition to explaining a victim’s behavior that otherwise might be misunderstood by jurors, it described an abuser’s reaction to loss of control in a relationship, inviting comparison with defendant’s actions; moreover, victim’s actions were not at issue and expert’s testimony did not explain victim’s behavior, thus expert’s testimony was not relevant).

702.a.040 An expert may testify about behavioral characteristics of certain classes of persons, but may not give an opinion about the accuracy, reliability, or truthfulness of a particular person, or quantify the percentage of such persons who are truthful.

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State v. Carlson, 237 Ariz. 381, 351 P.3d 1079, ¶¶ 29 (2015) (trial court precluded expert from testifying that defendant told him he falsely confessed and defendant's explanation why he did so; because (1) defendant's statements were inadmissible hearsay, (2) defendant never established that experts would have relied on such statements in forming opinion, (3) allowing that testimony would have cloaked statements with implication that expert relied on them while shielding defendant from rigors of cross-examination, and (4) expert in effect would have been giving opinion about defendant's truthfulness, trial court did not abuse discretion in precluding that testimony).

State v. Forde, 233 Ariz. 543, 315 P.3d 1200, ¶¶ 67–68 (2014) (trial court allowed defendant's expert witness to testify about factors affecting accuracy of eyewitness identification, but precluded specific opinions about reliability of victim's identification of defendant, and sustained objection to hypothetical questions that matched circumstances surrounding victim's identification of defendant; court held expert may educate jurors by testifying about behavioral characteristics affecting accuracy of eyewitness identification, but may not usurp jurors' role by offering opinions about accuracy, reliability, or credibility of particular witness, and may not do so under guise of hypothetical questions).

State v. Boggs, 218 Ariz. 325, 185 P.3d 111, ¶¶ 37–40 (2008) (during videotaped interrogation of defendant, detective accused defendant of lying; defendant claimed playing videotape to jurors violated his right to fair trial; court held that detective's accusations were part of interrogation technique and not for purpose of giving opinion testimony at trial, thus no error).

State v. Nordstrom, 200 Ariz. 229, 25 P.3d 717, ¶¶ 30–31 (2001) (expert testified about factors that affect ability of eyewitness to perceive, remember, and relate; trial court properly precluded expert from giving opinion of accuracy of particular eyewitness).

State v. Lujan, 192 Ariz. 448, 967 P.2d 123, ¶¶ 8–9, 11–13, 16, 20–21 (1998) (because defendant admitted playing with victim in swimming pool but denied ever touching her private parts, defendant was entitled to show victim was hypersensitive to interaction with adult males and thus may have mis-perceived her physical contact with defendant, and thus should have been allowed to introduce expert testimony about how victim's nearly contemporaneous sexual abuse by others may have caused victim to mis-perceive defendant's actions).

State v. Buccheri-Bianca, 233 Ariz. 324, 312 P.3d 123, ¶ 30 (Ct. App. 2013) (testimony by Wendy Dutton was sufficiently general to avoid running afoul of holding in *Lindsey*).

State v. Herrera, 232 Ariz. 536, 307 P.3d 103, ¶¶ 43–48 (Ct. App. 2013) (Wendy Dutton testified about behavior and characteristics of child abuse victims, and testified generally about in what situations alleged victims make false allegations; after jurors' submitted questions, "What percentage of allegations later prove to be false" and "What are the statistics of stepparents abusing stepchildren," defendant did not object to Dutton's answers; court noted none of Dutton's testimony dealt with victim's veracity; court held defendant failed to establish fundamental prejudicial error).

State v. Reimer, 189 Ariz. 239, 941 P.2d 912 (Ct. App. 1997) (when victim gave a different version when testifying, trial court erred in allowing officer to give opinion that victim was not lying when she gave version at time of assault).

702.a.045 Arizona has not addressed directly admissibility of testimony about a defendant's propensity to lie, but federal courts have not allowed such testimony unless it related to some mental or personality disorder that would cause the defendant to lie.

State v. Carlson, 237 Ariz. 381, 351 P.3d 1079, ¶¶ 32–35 (2015) (trial court precluded defendant's expert from testifying about risk factors that would tend to make defendant confess falsely; because defendant never suggested his confession was caused by any mental disorder, personality disorder, or similar affliction, and because defendant's expert did not diagnose or treat defendant and thus

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had no knowledge whether defendant had such disorders or conditions, trial court did not abuse discretion in precluding that testimony).

702.a.050 Although an expert may not give an opinion about the accuracy, reliability, or truthfulness of a particular person, a witness may disclose to jurors those facts that caused the witness not to believe a particular person.

State v. Doerr, 193 Ariz. 56, 969 P.2d 1168, ¶¶ 25–27 (1998) (defendant elicited testimony from officer that he did not believe defendant was truthful during questioning; state permitted to ask officer on rebuttal why he did not believe defendant was being truthful).

702.a.060 An expert may give an opinion of the defendant’s state of mind at the time of the offense only when the defendant raises an insanity defense.

State v. Moody, 208 Ariz. 424, 94 P.3d 1119, ¶¶ 101–07 (2004) (defendant’s experts testified defendant was in psychotic, dissociated state; trial court properly allowed state’s expert to give opinion that defendant was “malingering” and that money and cocaine were likely motives for the killings).

State v. Mott, 187 Ariz. 536, 931 P.2d 1046 (1997) (defendant was charged with child abuse for failure to seek treatment for her child after child was injured while in care of defendant’s boyfriend; defendant wanted to introduce evidence that her condition as a battered woman caused her to form a “traumatic bond” with her boyfriend, caused her to feel hopeless and depressed and that she could not escape, interfered with her ability to sense danger and protect others, and caused her to believe what her boyfriend told her and to lie to protect him, all of which would preclude her from forming the necessary intent; court held this was merely another form of diminished capacity, which the legislature has refused to adopt, thus evidence was not admissible).

State v. Lopez, 234 Ariz. 465, 323 P.3d 748, ¶¶ 20–23 (Ct. App. 2014) (defendant was charged with arson of structure, which requires knowingly causing fire; defendant sought to introduce evidence of his prior brain injury, which he claimed caused him to act impulsively and thus not knowingly; court held trial court properly precluded that evidence, noting that type of evidence was limited to rebut premeditation in charge of first-degree murder).

State v. Buot, 232 Ariz. 432, 306 P.3d 89, ¶¶ 9–20 (Ct. App. 2013) (defendant was driving at 40+ miles per hour on city street when he suddenly swerved into oncoming lane and slammed head-on into oncoming vehicle, killing driver; state charged defendant with second-degree murder; defendant sought to call expert witness to testify defendant had character trait of impulsivity that caused him to act reflexively rather than reflectively, and thus argue that defendant lacked requisite mental state for second-degree murder; court held trial court did not abuse discretion in ruling expert could testify based on defendant’s behavior he had personally observed, but could not testify about “mental diseases or conditions” that might relate to defendant’s capacity to form requisite *mens rea*).

State v. Wright, 214 Ariz. 540, 155 P.3d 1064, ¶¶ 6–7 (Ct. App. 2007) (defendant was charged with theft of means of transportation, which requires knowingly controlling vehicle with intent to deprive permanently; defendant sought to introduce expert testimony that his “mental capacity was lowered and that he is a naive-type of person” and thus could not have mental state necessary to commit crime; court held that *State v. Mott* precluded evidence of diminished capacity defense).

702.a.070 Because the Arizona legislature has declined to adopt a defense of diminished capacity, a defendant is precluded from maintaining that he or she cannot reflect upon his or her actions (or has a lesser capacity to do so); the defendant may, however, present evidence of defendant’s behavioral tendencies to challenge the *mens rea* of premeditation for a first degree murder charge.

- * *State v. Malone*, 247 Ariz. 29, 444 P.3d 733, ¶¶ 8–21 (2019) (defendant’s contended his proffered expert testimony about brain damage was not to prove he was incapable of reflecting, but was instead offered to demonstrate brain condition that rendered it less likely that he may have done so;

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court concluded defendant's proffered evidence was mental disease or defect evidence, and thus was inadmissible either to show defendant's inability to form *mens rea* or a likelihood he failed to do so, and thus could not be used to negate *mens rea*).

702.a.080 Although an expert may not give an opinion about the defendant's state of mind on the issue of *mens rea*, expert may testify about the defendant's behavior that expert observed ("observation evidence").

State v. Richter, 245 Ariz. 1, 424 P.3d 402, ¶¶ 32–37 (2018) (defendant was convicted of kidnapping and child abuse; court noted it upheld admissibility of observation evidence to rebut *mens rea*, which is necessarily subjective element, but stated that, because duress requires objective inquiry, and because evidence of "a defendant's tendency to think in a certain way or his [or her] behavioral characteristics" is inherently subjective, it concluded that observation evidence is likely not admissible to support duress defense).

State v. Jacobson, 244 Ariz. 187, 418 P.3d 960, ¶¶ 6–20 (Ct. App. 2017) (defendant fatally shot her live-in boyfriend in head while he was lying in bed; in severance proceedings, doctors diagnosed defendant with PTSD; for criminal proceedings, court held PTSD diagnosis was opinion testimony going to mental defect and its effect on cognitive or moral capacities on which sanity depends, and thus was not admissible, and disagreed with *Richter* court that such testimony was admissible as observation evidence).

State v. Wright, 214 Ariz. 540, 155 P.3d 1064, ¶¶ 11–12, 15–17 (Ct. App. 2007) (defendant charged with theft of means of transportation, which requires knowingly controlling vehicle with intent to deprive permanently; defendant sought to introduce expert testimony that his "mental capacity was lowered and that he is a naive-type of person" and thus could not have mental state needed to commit crime; court concluded expert testimony was about defendant's mental capacity generally and did not constitute observation evidence about defendant's relevant behavioral characteristics bearing on defendant's state of mind at time of offense, thus trial court properly precluded this evidence).

Paragraph (b) — Testimony based on sufficient facts or data.

702.b.010 A witness who is qualified as an expert may testify in the form of an opinion or otherwise if the testimony is based on sufficient facts or data.

- * *Lehn v. Al-Tanayyan*, 246 Ariz. 277, 438 P.3d 646, ¶¶ 23–25 (Ct. App. 2019) (father contended this court abused its discretion by relying on expert's testimony because expert relied on information from mother, unidentified international law experts, and governmental informational sources; expert explained his opinions about father were based on facts provided by mother and father's expert and acknowledged his opinions may lack foundation if those facts were incorrect (factual statement mother provided to expert was substantially consistent with her trial testimony); court held trial court did not abuse discretion in relying on expert's testimony).

Engstrom v. McCarthy, 243 Ariz. 469, 411 P.3d 653, ¶ 27 (Ct. App. 2018) (expert witness was licensed psychologist who had undergone years of training and served as an expert witness in dozens of cases, and had interviewed all relevant parties and reached his expert opinion based on interviews he conducted and facts he learned from those interviews; court held trial court did not abuse its discretion by allowing expert to testify and give his opinions).

State v. Jacobson, 244 Ariz. 187, 418 P.3d 960, ¶¶ 16–17 (Ct. App. 2017) (defendant fatally shot her live-in boyfriend while he was lying in bed; in severance proceedings, doctors diagnosed defendant with PTSD; for criminal proceedings, court noted diagnosis was based solely on defendant's statements to doctors that boyfriend had abused her and not on any outside observations, and that defendant had omitted key information, thus testimony was based on insufficient facts or data and therefore was not admissible).

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Sandretto v. Payson Health. Mgmt., 234 Ariz. 351, 322 P.3d 168, ¶¶ 18–19 (Ct. App. 2014) (expert witness had plaintiff complete McGill Pain Questionnaire, performed neurological examination, and performed bone scan).

Glazer v. State, 234 Ariz. 305, 321 P.3d 470, ¶¶ 25, 38 (Ct. App. 2014) (crossover collision occurred 8/07 on I–10 near milepost 171; plaintiff claimed State was negligent in not installing median barriers necessitated by material changes occurring on I–10 within decade (or less) prior to 2007; State transportation department did not retain information on crossover accidents prior to 2003, thus plaintiff's expert only reviewed information on crossover accidents from 2003 to 2007; court held this was sufficient for expert's opinions); ¶¶ 9–25 *vac'd*, 237 Ariz. 160, 347 P.3d 1141, ¶ 36 (2015).

State ex rel. Montgomery v. Miller (Madrid), 234 Ariz. 289, 321 P.3d 454, ¶¶ 29–30 (Ct. App. 2014) (court notes subsection (b) examines quantity of information possessed by expert, not reliability or admissibility of information itself; court further notes reliability of expert's methodology and opinions is determined under subsections (c) and (d)).

State v. Bernstein (Herman et al.), 234 Ariz. 89, 317 P.3d 630, ¶ 15 (Ct. App. 2014) (court held record fully supported trial court's finding that state showed by preponderance of evidence that Scottsdale Crime Lab's BAC test results were based on sufficient facts or data); ¶¶ 19–28 *vac'd*, 237 Ariz. 226, 349 P.3d 200, ¶ 23 (2015).

Standard Chartered PLC v. Price Waterhouse, 190 Ariz. 6, 945 P.2d 317 (Ct. App. 1996) (in litigation over sale of bank, plaintiff-purchaser claimed \$23 million loss reserve figure supplied by defendant-seller understated amount of uncollectible loans; defendant-seller sought to introduce plaintiff-purchaser's tax filing made 1½ years after sale showing loss reserve of \$9.8 million; trial court excluded this evidence because defendant-seller's expert witness could not testify to what plaintiff-purchaser actually did in preparing tax filing and could only testify about what plaintiff-purchaser should have done; court held there was sufficient factual basis for evidence and thus it should have been admitted, and that any dispute about the \$9.8 million figure went to weight and not admissibility of opinion).

702.b.020 Ambiguities about the factual basis for an expert's opinion go to the weight and not the admissibility of the opinion.

T.W.M. Custom Framing v. Industrial Comm'n, 198 Ariz. 41, 6 P.2d 745, ¶¶ 18–20 (Ct. App. 2000) (decedent-employee committed suicide, and issue was whether decedent-employee's industrial injury so deprived him of normal judgment that his action in committing suicide would not be considered "purposeful" and thus would entitle his widow and child to collect death benefits; psychiatrist conducted psychiatric autopsy and testified that decedent's depressed mental condition resulted from his work-related injuries; employer contended that foundation for psychiatrist's testimony was inadequate because he relied on widow's testimony to formulate his opinions; court noted psychiatrist also relied medical records, police reports, and prior testimony, and concluded there was appropriate foundation for opinion).

State v. Wells Fargo Bank, 194 Ariz. 126, 978 P.2d 103, ¶ 31 (Ct. App. 1998) (plaintiff contended trial court erred in admitting expert opinion because expert did not perform specific study on economic impact of freeway on defendant's property; expert based opinion on materials published on subject, his prior appraisal studies, his own experience as urban economist, and inspection of area; court held that trial court properly admitted testimony).

Souza v. Fred Carriers Contracts, Inc., 191 Ariz. 247, 955 P.2d 3 (Ct. App. 1997) (because vehicle had been destroyed, accident reconstruction expert was not able to examine it; court held that inspection of vehicle was not always necessary for opinion of how and why accident happened, and any shortcomings went to weight and not admissibility of opinion).

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702.b.030 Merely because a “cold” expert testifies about principles and methods without applying those principles and methods to the facts of the case does not mean the expert testimony is not based on sufficient facts or data.

State v. Salazar-Mercado, 234 Ariz. 590, 325 P.3d 996, ¶¶ 6–11 (2014) (court analyzes federal cases).

Paragraph (c) — Reliable principles and methods.

702.c.010 A witness who is qualified as an expert may testify in the form of an opinion or otherwise if the testimony is the product of reliable principles and methods.

State v. Escalante-Orozco, 241 Ariz. 254, 386 P.3d 798, ¶¶ 45–47 (2017) (because police department’s protocol guidelines permitted witness to use below-threshold allele for statistical purposes, witness’s opinion was reliable).

State v. Romero, 236 Ariz. 451, 341 P.3d 493, ¶¶ 12–18 (Ct. App. 2014) (court concluded field of fire-arm identification sufficiently reliable), *vac’d in part*, 239 Ariz. 6, 365 P.3d 358, ¶ 31 (2016).

State v. Favela, 234 Ariz. 433, 323 P.3d 716, ¶¶ 9, 12 (Ct. App. 2014) (court held testimony of latent print examiner was sufficient to show methodology was reliable and further stated “errors in fingerprint matching by expert examiners appear to be very rare”).

Glazer v. State, 234 Ariz. 305, 321 P.3d 470, ¶¶ 33–37 (Ct. App. 2014) (crossover collision occurred in August 2007 on I–10 near milepost 171; plaintiff contended State was negligent in not installing median barriers necessitated by material changes occurring on I–10 within the decade (or less) prior to 2007 collision; State contended sources upon which plaintiff’s expert relied did not apply to condition of highway where collision occurred; court held that, even though State presented contrary information, plaintiff’s expert’s methodology and application were acceptable and thus trial court did not abuse discretion in admitting expert’s testimony); ¶¶ 9–25 *vac’d*, 237 Ariz. 160, 347 P.3d 1141, ¶ 36 (2015).

State v. Bernstein (Herman et al.), 234 Ariz. 89, 317 P.3d 630, ¶¶ 16–18 (Ct. App. 2014) (trial court found gas chromatography was accepted within scientific community, which showed methodology had been tested, subjected to peer review, gained general acceptance; and met international standards; court held record fully supported trial court’s finding that state showed by preponderance of evidence that Scottsdale Crime Lab’s BAC test results were based on reliable principles and methods; court discussed known or potential rate of error in context of Rule 702(d)); ¶¶ 19–28 *vac’d*, 237 Ariz. 226, 349 P.3d 200, ¶ 23 (2015).

702.c.011 *Daubert* identified five non-exclusive factors for courts to consider in determining whether scientific evidence is reliable, the *first* of which is: (1) whether the scientific methodology has been tested.

State v. Fosbay, 239 Ariz. 271, 370 P.3d 618, ¶ 13 (Ct. App. 2016) (witness’s testimony showed 3–D confocal microscopy methodology was testable).

State ex rel. Montgomery v. Miller (Madrid), 234 Ariz. 289, 321 P.3d 454, ¶¶ 31–32 (Ct. App. 2014) (expert’s assumption that average person reaches peak BAC within 2 hours after last drink can be and has been tested).

State v. Bernstein (Herman et al.), 234 Ariz. 89, 317 P.3d 630, ¶¶ 12–13 (Ct. App. 2014) (opinion notes *Daubert* factors are discussed in context of Rule 702(c)); ¶¶ 19–28 *vac’d*, 237 Ariz. 226, 349 P.3d 200, ¶ 23 (2015).

702.c.012 *Daubert* identified five non-exclusive factors for courts to consider in determining whether scientific evidence is reliable, the *second* of which is: (2) whether the methodology has been subjected to peer review, although publication is not *sine qua non* of admissibility of expert testimony.

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State v. Fosbary, 239 Ariz. 271, 370 P.3d 618, ¶ 13 (Ct. App. 2016) (witness's testimony showed 3-D confocal microscopy methodology was subjected to peer review).

State ex rel. Montgomery v. Miller (Madrid), 234 Ariz. 289, 321 P.3d 454, ¶¶ 33–35 (Ct. App. 2014) (expert testified his methodology of performing retrograde extrapolation calculations had been peer reviewed in several scholarly journals; in addition, state submitted several peer reviewed publications discussing use of average absorption rates in performing retrograde extrapolation calculations).

State v. Bernstein (Herman et al.), 234 Ariz. 89, 317 P.3d 630, ¶¶ 12–13 (Ct. App. 2014) (notes *Daubert* factors discussed in context of Rule 702(c)); ¶¶ 19–28 *vac'd*, 237 Ariz. 226, 349 P.3d 200, ¶ 23 (2015).

702.c.013 *Daubert* identified *five* non-exclusive factors for courts to consider in determining whether scientific evidence is reliable, the *third* of which is: (3) the known or potential rate of error when applied.

State v. Fosbary, 239 Ariz. 271, 370 P.3d 618, ¶ 13 (Ct. App. 2016) (testimony showed 3-D confocal microscopy methodology was studied sufficiently to establish known or potential rates of error).

State ex rel. Montgomery v. Miller (Madrid), 234 Ariz. 289, 321 P.3d 454, ¶¶ 39–44 (Ct. App. 2014) (while some tests showed some persons reach peak BAC more than 2 hours after last drink, expert testified that does not reflect absorption rate for average person, and further accounted for potential rate of error in methodology in several ways, including using conservative rates).

State v. Bernstein (Herman et al.), 234 Ariz. 89, 317 P.3d 630, ¶¶ 12–13 (Ct. App. 2014) (notes *Daubert* factors discussed in context of Rule 702(c)); ¶¶ 19–28 *vac'd*, 237 Ariz. 226, 349 P.3d 200, ¶ 23 (2015).

702.c.014 *Daubert* identified *five* non-exclusive factors for courts to consider in determining whether scientific evidence is reliable, the *fourth* of which is: (4) whether the methodology has general acceptance within the relevant scientific community (old *Frye* test).

State v. Fosbary, 239 Ariz. 271, 370 P.3d 618, ¶ 13 (Ct. App. 2016) (witness's testimony showed 3-D confocal microscopy methodology was generally accepted within relevant scientific community).

State ex rel. Montgomery v. Miller (Madrid), 234 Ariz. 289, 321 P.3d 454, ¶¶ 36–38 (Ct. App. 2014) (state presented evidence that expert's methodology based on assumption that average person reaches peak BAC within 2 hours after last drink was generally accepted in relevant scientific community).

State v. Bernstein (Herman et al.), 234 Ariz. 89, 317 P.3d 630, ¶¶ 12–13 (Ct. App. 2014) (notes *Daubert* factors discussed in context of Rule 702(c)); ¶¶ 19–28 *vac'd*, 237 Ariz. 226, 349 P.3d 200, ¶ 23 (2015).

702.c.015 *Daubert* identified *five* non-exclusive factors for courts to consider in determining whether scientific evidence is reliable, the *fifth* of which is: (5) the existence and maintenance of standards controlling the technique's operation.

State ex rel. Montgomery v. Miller (Madrid), 234 Ariz. 289, 321 P.3d 454, ¶¶ 45–46 (Ct. App. 2014) (both experts agreed on validity and standard use of basic science underlying retrograde analysis).

State v. Bernstein (Herman et al.), 234 Ariz. 89, 317 P.3d 630, ¶¶ 12–13 (Ct. App. 2014) (notes *Daubert* factors discussed in context of Rule 702(c)); ¶¶ 19–28 *vac'd*, 237 Ariz. 226, 349 P.3d 200, ¶ 23 (2015).

702.c.016 In addition to the five non-exclusive factors identified by the United States Supreme Court in *Daubert*, courts have identified *four* other factors for courts to consider in determining whether scientific evidence is reliable, the *first* of which is: (1) whether the expert's testimony is prepared solely in anticipation of litigation or is based on independent research.

State ex rel. Montgomery v. Miller (Madrid), 234 Ariz. 289, 321 P.3d 454, ¶¶ 25, 47–48 (Ct. App. 2014) (although retrograde extrapolation is forensic science primarily used to establish person's BAC for purpose of criminal DUI prosecution, methodology of retrograde extrapolation has undergone great deal of testing outside of courtroom).

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702.c.017 In addition to the five non-exclusive factors identified by the United States Supreme Court in *Daubert*, courts have identified *four* other factors for courts to consider in determining whether scientific evidence is reliable, the *second* of which is: (2) whether the expert's field of expertise/discipline is known to produce reliable results.

State ex rel. Montgomery v. Miller (Madrid), 234 Ariz. 289, 321 P.3d 454, ¶¶ 25, 49–54 (Ct. App. 2014) (although several Arizona cases have recognized utility and admissibility of retrograde extrapolation, none has address reliability of methodology used by state's expert; several courts from other jurisdiction have, however, found that methodology to be reliable).

702.c.018 In addition to the five non-exclusive factors identified by the United States Supreme Court in *Daubert*, courts have identified *four* other factors for courts to consider in determining whether scientific evidence is reliable, the *third* of which is: (3) whether other courts have determined the expert's methodology is reliable.

State ex rel. Montgomery v. Miller (Madrid), 234 Ariz. 289, 321 P.3d 454, ¶¶ 25, 49–54 (Ct. App. 2014) (although no Arizona cases have address reliability of methodology used by state's expert for retrograde extrapolation, several courts from other jurisdiction have found that methodology reliable).

702.c.019 In addition to the five non-exclusive factors identified by the United States Supreme Court in *Daubert*, courts have identified *four* other factors for courts to consider in determining whether scientific evidence is reliable, the *fourth* of which is: (4) whether there are non-judicial uses for the expert's methodology/science.

State ex rel. Montgomery v. Miller (Madrid), 234 Ariz. 289, 321 P.3d 454, ¶¶ 25, 47–48 (Ct. App. 2014) (although retrograde extrapolation is forensic science primarily used to establish person's BAC for purpose of criminal DUI prosecution, methodology of retrograde extrapolation has undergone great deal of testing outside of courtroom).

702.c.020 The factors identified in *Daubert* may or may not be pertinent in assessing reliability, depending on the nature of the issue, the expert's particular expertise, and the subject of the expert's testimony, thus the nature of the inquiry under Rule 702 must be tied to the facts of the particular case.

State v. Bernstein (Herman et al.), 234 Ariz. 89, 317 P.3d 630, ¶ 12 (Ct. App. 2014) (notes *Daubert* factors discussed in context of Rule 702(c)); ¶¶ 19–28 *vac'd*, 237 Ariz. 226, 349 P.3d 200, ¶ 23 (2015).

Arizona State Hospital v. Klein, 231 Ariz. 467, 296 P.3d 1003, ¶¶ 25–32 (Ct. App. 2013) (court held trial court did not abuse discretion in ordering hearing to determine whether expert witness was qualified to testify in discharge proceeding under A.R.S. § 36–3714).

702.c.030 Expert testimony based on the witness's own experience, observation, and study, and the witness's own research and that of others, is admissible if (1) the witness is qualified as an expert, and (2) the testimony will aid the jurors to understand the evidence or to determine a fact in issue; for such evidence.

State v. Salazar-Mercado, 234 Ariz. 590, 325 P.3d 996, ¶¶ 16–19 (2014) (because defendant did not present any studies, testimony, or other evidence casting doubt on CSAAS, trial court acted within its discretion in admitting that evidence).

Logerquist v. McVey (Danforth), 196 Ariz. 470, 1 P.3d 113, ¶¶ 30–32, 62 (2000) (because testimony on repressed memory caused by severe childhood trauma (including sexual abuse), dissociative amnesia, and retrieved memories was testimony about human behavior and not about some scientific principle, court held trial court erred in applying “generally accepted” standard to this testimony).

State v. Lee(II), 189 Ariz. 608, 944 P.2d 1222 (1997) (court concluded detective's expert testimony on blood-spatter did not contradict opinion of medical examiner, thus rejected defendant's claim

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that testimony was not reliable; because testimony helped jurors understand sequence of shots, and detective's non-inflammatory language was not unfairly prejudicial, testimony was admissible).

Sandretto v. Payson Health. Mgmt., 234 Ariz. 351, 322 P.3d 168, ¶ 14 (Ct. App. 2014) (comment to rule states 2012 amendment was not intended to preclude testimony of experience-based experts, and nothing in amendment suggests that experience alone, or in conjunction with other knowledge, skill, training, or education, may not provide sufficient foundation for expert testimony).

Lear v. Fields, 226 Ariz. 226, 245 P.3d 911, ¶¶ 14–22 (Ct. App. 2011) (A.R.S. § 12–2203 does not alter substantive law, but instead controls admissibility of expert witness testimony and thus controls procedural matters, thus it conflicts with existing rules of evidence and is unconstitutional).

Pipher v. Loo, 221 Ariz. 399, 212 P.3d 91, ¶¶ 16–18 (Ct. App. 2009) (expert witness testified he was board certified with 35 years' experience, had given thousands of injections of type at issue, and had number of patients with type of injury at issue; trial court precluded expert's testimony because it concluded testimony lacked foundation, was speculative, and lacked adequate basis under Rules 702 and 703; court held trial court erred in excluding this testimony and remanded for new trial).

Lobmeier v. Hammer, 214 Ariz. 57, 148 P.3d 101, ¶¶ 36–48 (Ct. App. 2006) (expert witness was bio-mechanical engineer, and based on his own training and experimentation and on works of others, testified that rear-end collision did not cause plaintiff's injuries; court held trial court did not err allowing expert witness to testify).

State v. Speers, 209 Ariz. 125, 98 P.3d 560, ¶¶ 14–16 (Ct. App. 2004) (defendant was charged with 18 counts of sexual exploitation of minors based on computer images; trial court admitted as propensity evidence testimony from two second-grade students of alleged misconduct with them; court held that, because propensity evidence testimony was relevant, testimony from expert witness about suggestive interview techniques was also relevant, thus trial court erred in precluding this evidence).

702.c.040 Expert testimony based on a novel scientific principle, formula, technique, or procedure developed or advanced by others is admissible if (1) the witness is qualified as an expert, (2) the testimony will aid the jurors to understand the evidence or to determine a fact in issue, and (3) the scientific principle, formula, technique, or procedure has gained general acceptance in the particular scientific field in which it belongs.

State v. Burns, 237 Ariz. 1, 344 P.3d 303, ¶¶ 63–65 (2015) (defendant contended trial court should have precluded testimony of state's ballistics expert under *Frye*; because testimony did not rely on any novel theory or process, it was not subject to *Frye*).

State v. Miller, 234 Ariz. 31, 316 P.3d 1219, ¶¶ 29–31 (2013) (because trial ended in September 2011, *Frye* standard was still in effect, thus no need to use *Daubert* analysis).

Logerquist v. McVey (Danforth), 196 Ariz. 470, 1 P.3d 113, ¶¶ 30–32, 47, 53, 62 (2000) (because expert testimony on repressed memory caused by severe childhood trauma (including sexual abuse), dissociative amnesia, and retrieved memories was testimony about human behavior and not testimony about some scientific principle, court held trial court erred in applying “generally accepted” standard to this testimony).

Lear v. Fields, 226 Ariz. 226, 245 P.3d 911, ¶¶ 14–22 (Ct. App. 2011) (A.R.S. § 12–2203 (Arizona *Daubert*) does not alter any substantive law, but instead is attempt to control admissibility of expert witness testimony in all cases and such controls procedural matters; because it conflicts with existing rules of evidence, it is unconstitutional).

702.c.050 If the evidence is not derived from application of a scientific principle or process, but is instead the result of observing and identifying the way that certain things happen, there is no requirement that the party offering the evidence show general acceptance in the particular field in which it belongs.

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State v. Nordstrom, 200 Ariz. 229, 25 P.3d 717, ¶¶ 28–29 (2001) (although Arizona Supreme Court has held “general acceptance” test not required for expert testimony about human behavioral characteristics, court stated expert testimony about behavioral characteristics of eyewitnesses admissible if opinion “conforms to an appropriately scientific explanatory theory”; this statement was dicta).

Logerquist v. McVey (Danforth), 196 Ariz. 470, 1 P.3d 113, ¶¶ 30–32, 62 (2000) (because expert testimony on repressed memory caused by severe childhood trauma (including sexual abuse), dissociative amnesia, and retrieved memories was testimony about human behavior and not testimony about some scientific principle, court held trial court erred in applying “generally accepted” standard to this testimony).

State v. Boles, 188 Ariz. 129, 132, 933 P.2d 1197, 1200 (1997) (*Frye* analysis not needed when expert testified about his experiences with DNA matching).

State v. Hummert, 188 Ariz. 119, 125, 933 P.2d 1187, 1193 (1997) (*Frye* analysis not needed when expert testified about his experiences with DNA matching).

State v. Speers, 209 Ariz. 125, 98 P.3d 560, ¶¶ 18–19 (Ct. App. 2004) (defendant charged with 18 counts of sexual exploitation of minors based on computer images; trial court admitted as propensity evidence testimony from two second-grade students of alleged misconduct with them; because testimony from expert witness about suggestive interview techniques was based on experience and observations about human behavior and not on scientific principles, trial court erred in excluding it based on conclusion that proposed testimony was not accepted by scientific community).

State v. Lucero, 207 Ariz. 301, 85 P.3d 1059, ¶¶ 16–21 (Ct. App. 2004) (expert’s opinion that defendant was impaired by use of marijuana was based on knowledge and experience as forensic toxicologist and not on novel scientific principles, thus hearing was not necessary).

State v. Fields (Medina), 201 Ariz. 321, 35 P.3d 82, ¶¶ 17–23 (Ct. App. 2001) (in SVPA proceeding, trial court required *Frye* hearing before admitting actuarial data upon which experts relied in rendering opinions on recidivism; court held that, although actuarial data was developed by others and not by person testifying, actuarial data was based on human behavior and not novel scientific principles, thus trial court erred in ordering *Frye* hearing).

State v. Curry, 187 Ariz. 623, 629, 931 P.2d 1133, 1139 (Ct. App. 1996) (no need for a *Frye* hearing before admitting evidence of child sexual abuse accommodation syndrome (CSAAS)).

702.c.060 Expert testimony based on a novel scientific principle, formula, technique, or procedure developed or advanced by others is admissible if the scientific principle, formula, technique, or procedure has gained general acceptance in the particular scientific field in which it belongs, which means that the principle or process is generally accepted as being capable of doing what it purports to do; if the validity of a new scientific technique is in controversy in the relevant scientific community or if it is generally regarded as merely experimental, expert testimony based on its validity may not be admitted.

Logerquist v. McVey (Danforth), 196 Ariz. 470, 1 P.3d 113, ¶¶ 30–32, 47, 53, 62 (2000) (because expert testimony on repressed memory caused by severe childhood trauma (including sexual abuse), dissociative amnesia, and retrieved memories was testimony about human behavior and not testimony about some scientific principle, court held trial court erred in applying “generally accepted” standard to this testimony).

State v. Tankersley, 191 Ariz. 359, 956 P.2d 486, ¶ 18 (1998) (*Frye* test does not require unanimity).

State v. Esser, 205 Ariz. 320, 70 P.3d 449, ¶¶ 11–13 (Ct. App. 2003) (court noted that alcohol breath testing has been found to be generally accepted in scientific community, thus it was defendant’s burden to prove testing was not accorded general acceptance; court noted defendant’s evidence was only that his expert and other authors of scientific articles disagreed with traditional theory of physi-

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ology underlying alcohol-breath interchange, and held this went only to weight of traditional evidence, rather than its admissibility).

Wozniak v. Galati, 200 Ariz. 550, 30 P.3d 131, ¶¶ 5, 9–12 (Ct. App. 2001) (defendant failed to present evidence that drug screen tests are not accepted in scientific community as way to identify presence of drugs; defendant's evidence went only to how accurate drug screen tests were to show presence of drugs, and that went to weight, not admissibility).

State v. Garcia, 197 Ariz. 79, 3 P.3d 999, ¶¶ 7–27 (Ct. App. 1999) (testing of stains on clothing showed presence of semen from more than one person; state offered expert testimony relying on formulae used to determine statistical probability of random DNA match; court concluded methodology and formulae used were accepted by general scientific community).

State v. Claybrook, 193 Ariz. 588, 975 P.2d 1101, ¶ 15 (Ct. App. 1998) (retroactive extrapolation to determine BAC at prior time is generally accepted in relevant scientific community).

702.c.070 When scientific evidence has been offered and received in other cases, if a party claims that the scientific principles in question have not gained general acceptance in the particular field, that party must introduce some authority to that effect before the trial court will require the other party to present evidence of general acceptance.

State v. Lucero, 207 Ariz. 301, 85 P.3d 1059, ¶¶ 4–11 (Ct. App. 2004) (defendant attacked evidence based on gas chromatography/mass spectrometry (GC/MS); court noted GC/MS technology had long been accepted by courts, and that absence of reported Arizona opinion expressly approving this method did not give defendant right to hearing).

702.c.080 Principles and theory underlying DNA matching and match criteria are generally accepted in the scientific community, and are therefore admissible.

State v. Benson, 232 Ariz. 452, 307 P.3d 19, ¶¶ 18–20 (2013) (analyst could not establish DNA profile for anal swab, but DNA profile from breast swab matched defendant's DNA profile; when crime lab retested anal swab several months later with newer technology, analyst was able to match profile taken from that swab with defendant's profile; defendant moved to preclude evidence of second test based on his expert's testimony that no scientifically validated explanation justified different results; court held state's analysis did not rely on novel scientific theories or processes for second analysis for anal swabs, thus conclusions were not governed by *Frye* and were governed instead by Rules 403, 702, and 703; whether analysts offered viable explanations for different results obtained in each test was properly for jurors to decide).

State v. Davolt, 207 Ariz. 191, 84 P.3d 456, ¶¶ 67–68 (2004) (court noted that it had previously held DNA evidence based on product rule method of calculating probability of match acceptable when database satisfies *Frye* requirements, thus trial court did not abuse discretion in denying defendant's motion to preclude DNA evidence).

State v. Lebr, 201 Ariz. 509, 38 P.3d 1172, ¶¶ 16–19 (2002) (trial court took judicial notice that principles and theories underlying DNA analysis in forensic labs are generally accepted in scientific community and that RFLP method in particular met general acceptance test).

State v. (Van) Adams, 194 Ariz. 408, 984 P.2d 16, ¶¶ 31–33 (1999) (for polymerase chain reaction (PCR) technology, Arizona has recognized general scientific acceptance of RFLP, RAPD, and reverse dot blotting technology).

State v. Sharp, 193 Ariz. 414, 973 P.2d 1171, ¶ 24 (1999) (Arizona Supreme Court has already held RFLP method of DNA analysis is generally accepted in Arizona and is reliable, thus trial court did not need to hold a *Frye* hearing).

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State v. Tankersley, 191 Ariz. 359, 956 P.2d 486, ¶ 19 (1998) (PCR technology and DQ-alpha marking system are generally accepted in relevant scientific community).

State v. Hummert, 188 Ariz. 119, 124, 933 P.2d 1187, 1192 (1997) (court noted recent scientific analysis has shown other methods of quantifying DNA matching gained scientific acceptance).

State v. Marshall, 193 Ariz. 547, 975 P.2d 137, ¶ 7 (Ct. App. 1998) (court held issue of “match window” goes to weight and not admissibility, and also noted expert testimony was that “match window” of plus or minus 2.5% used by FBI was generally accepted in community).

702.c.090 DNA random match probability calculations and opinions based on those calculations are generally accepted in the relevant scientific community.

State v. Hummert, 188 Ariz. 119, 124, 933 P.2d 1187, 1192 (1997) (court noted recent scientific analysis has shown other methods of quantifying DNA matching gained scientific acceptance).

State v. Bigger, 227 Ariz. 196, 254 P.3d 1142, ¶¶ 23–34 (Ct. App. 2011) (state offered testimony from expert witnesses about DNA from radio knob in victim’s car using short tandem repeats (STR) and statistics using random man not excluded (RMNE) and likelihood ratio (LR) methods; defendant contended there was no generally accepted method of generating statistics for “low-level mixture” or “low-copy number (LCN)” situations; court noted LR, RMNE, and modified product rule are DNA interpretations generally accepted in relevant scientific community, and thus held trial court properly admitted expert witness testimony).

State v. Marshall, 193 Ariz. 547, 975 P.2d 137, ¶¶ 9–11 (Ct. App. 1998) (because National Research Council withdrew its earlier suggestion that only modified ceiling method be used and now endorses unrestricted product rule, and because majority of cases from other jurisdictions have approved that rule, it appears unrestricted product rule is now generally accepted in relevant scientific community).

702.c.100 Expert testimony about fingerprint evidence remains admissible under the new rules.

State v. Favela, 234 Ariz. 433, 323 P.3d 716, ¶¶ 4–7 (Ct. App. 2014) (police found latent palm print that matched defendant’s palm print).

Paragraph (d) — Reliably applied principles and methods.

702.d.010 A witness who is qualified as an expert may testify in the form of an opinion or otherwise if the expert has reliably applied the principles and methods to the facts of the case.

State v. Escalante-Orozco, 241 Ariz. 254, 386 P.3d 798, ¶¶ 52–53 (2017) (because witness properly applied guidelines from Scientific Working Group on DNA Analysis Methods, trial court did not abuse discretion in admitting witness’s testimony).

State v. Escalante-Orozco, 241 Ariz. 254, 386 P.3d 798, ¶¶ 60–61 (2017) (although defense expert criticized identifying major contributor based on information at only one locus, jurors could decide whose opinion to credit).

State v. Bernstein (Herman et al.), 237 Ariz. 226, 349 P.3d 200, ¶¶ 13, 21 (2015) (evidence showed gas chromatograph properly analyzed sample from each defendant; court held record showed state established by preponderance of evidence that criminalist reliably applied principles and methods to facts of case; fact that gas chromatograph did not properly analyze samples from other defendants did not affect application of principles and methods to sample from each defendant).

State v. Salazar-Mercado, 234 Ariz. 590, 325 P.3d 996, ¶ 5 (2014) (court states subsection (d) is ambiguous, thus interpretation is necessary).

Vanoss v. BHP Copper Inc., 244 Ariz. 90, 418 P.3d 457, ¶¶ 13–14 (Ct. App. 2018) (BHP began rebuilding and refurbishing certain facilities at ore mine that had been inoperable for several years, and hired Tetra Tech as independent contractor to refurbish ore chute system in secondary crusher).

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building; during work on project, Vanoss died from apparent fall from fourth floor of secondary crusher building; family contended trial court erroneously granted partial summary judgment in favor of BHP alleging that, as a mine operator, BHP owed non-delegable duty to Vanoss pursuant to certain mine-safety statutes and regulations; court held landowner is not liable to employee of independent contractor for negligence of that contractor; family contended trial court erred by preventing its mine-safety expert from testifying about certain mine-safety statutes and regulations; court noted expert's opinions depended on attributing vicarious liability to BHP for Tetra Tech's failure to comply with certain mine-safety statutes and regulations, and because trial court had correctly granted summary judgment in favor of BHP on vicarious liability and non-delegable duty, it correctly precluded expert from testifying about statutes and regulations).

State v. Favela, 234 Ariz. 433, 323 P.3d 716, ¶ 10 (Ct. App. 2014) (court held testimony of latent print examiner was sufficient to show she reliably applied methodology to facts of case).

State ex rel. Montgomery v. Miller (Madrid), 234 Ariz. 289, 321 P.3d 454, ¶ 59 (Ct. App. 2014) (based on analysis of factors under Rule 702 subsections (c) and (d), court concluded state's expert's retrograde extrapolation methodology was reliable, even though expert did not know exactly when defendant would reach peak BAC after last drink, and did not know defendant's drinking and eating history).

Nash v. Nash, 232 Ariz. 473, 307 P.3d 40, ¶ 21 & n.7 (Ct. App. 2013) (in trial held before adoption of 2012 amendments, because there were numerous analytical flaws leading to expert witness's opinions, trial court did not abuse discretion in declining to accept those opinions, finding they were neither reliable nor correct).

702.d.020 In determining whether an expert has reliably applied a generally reliable methodology to the facts of a particular case, the trial court first makes a determination under its gatekeeping function, but should only exclude such evidence if the flaws so infected the procedure that it makes the results unreliable; in close cases, the trial court should allow the jurors to exercise its fact-finding function because it is the jurors' exclusive province to assess the weight and admissibility of evidence.

State v. Bernstein (Herman et al.), 237 Ariz. 226, 349 P.3d 200, ¶¶ 12–21 (2015) (evidence showed gas chromatograph properly analyzed sample from each defendant; court held record showed state established by preponderance of evidence that criminalist reliably applied principles and methods to facts of case; fact that gas chromatograph did not properly analyze samples from other defendants did not affect application of principles and methods to sample from each defendant).

702.d.030 In assessing the reliability of an expert's conclusions and opinions, courts have considered several factors, including the following: (1) whether the expert employs the same care as a litigation expert that the person would in regular professional work outside the courtroom; (2) whether the expert has accounted for obvious alternative explanations; and (3) whether the expert's opinion adequately accounts for available data and unknown variables.

State ex rel. Montgomery v. Miller (Madrid), 234 Ariz. 289, 321 P.3d 454, ¶ 27, ¶¶ 55–58 (Ct. App. 2014) (state's expert adequately accounted for obvious alternative explanations and unknown variables).

702.d.040 The requirement that an expert reliably apply the principles and methods to the facts of the case does not mean that an expert must apply those principles and methods to the specific facts that exist in the case, it means instead that, if the expert applies the principles and methods to the facts of a case, the expert must do so reliably, thus this rule does not preclude a "cold" expert from testifying about principles and methods without applying those principles and methods to the facts of the case.

State v. Salazar-Mercado, 234 Ariz. 590, 325 P.3d 996, ¶¶ 6–11 (2014) (court rejected defendant's contention that trial court abused discretion in allowing Dr. Wendy Dutton to testify about general characteristics of child victims of sexual abuse without applying that testimony to facts of case).

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702.d.050 If a particular technique has gained acceptance in the scientific community, the accuracy of its implementation in a particular case is subject to ordinary foundational considerations; if experts from opposing side contends deficiencies in procedure are sufficiently serious, claimed deficiencies go to weight of the evidence of the procedure; trial court should not *per se* exclude evidence, and should instead admit evidence, subject to the usual cross-examine and presentation of contrary evidence, with jurors to determine the weight of the evidence.

State v. Bernstein (Herman et al.), 237 Ariz. 226, 349 P.3d 200, ¶ 11 (2015) (comment to Rule 702 stated “[t]he trial court’s gatekeeping function is not intended to replace the adversary system” and “[c]ross-examination, presentment of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence”).

State v. Montañño, 204 Ariz. 413, 65 P.3d 61, ¶ 69 (2003) (defendant’s claim that DNA is “magic” and “bogus,” that one witness had judgment against him, that *USA Today* ran article calling British DNA database “flawed,” and that DNA evidence was not overwhelming in this case, were merely attacks on weight of evidence, which was within province of jurors).

State v. Lehr, 201 Ariz. 509, 38 P.3d 1172, ¶¶ 16–31 (2002) (in consolidated action, judge holding consolidated hearing took judicial notice of fact that principles and theories underlying DNA analysis in forensic labs are generally accepted in scientific community and that RFLP method in particular met general acceptance test, and then held claimed deficiencies in laboratory procedure did not preclude admission of evidence; at trial, trial judge precluded defendant from cross-examining witness about laboratory procedure, ruling this would be re-litigating issues resolved at consolidated hearing; court held jurors must assess weight of evidence of laboratory procedure, and thus held trial judge erred in precluding this evidence).

State v. (Van) Adams, 194 Ariz. 408, 984 P.2d 16, ¶ 34 (1999) (for polymerase chain reaction (PCR) technology, Arizona has recognized general scientific acceptance of RFLP, RAPD, and reverse dot blotting technology; challenges to application of these techniques by Arizona Department of Public Safety crime lab went to weight, not admissibility).

State v. Tankersley, 191 Ariz. 359, 956 P.2d 486, ¶¶ 20–21 (1998) (defendant challenged lack of written protocols and current proficiency testing, excessive number of cycles run on thermal cycler, temperature regulation problems, failure to quantify sample’s DNA before amplification, and reporting of results despite evidence of contamination).

State v. Bigger, 227 Ariz. 196, 254 P.3d 1142, ¶¶ 35–39 (Ct. App. 2011) (state offered testimony from expert witnesses about DNA from radio knob in victim’s car using short tandem repeats (STR) and statistics using random man not excluded (RMNE) and likelihood ratio (LR) methods; defendant contended expert witnesses’ formulas were flawed because they were based on partial information; court held this went to weight of evidence and not its admissibility).

State v. Lucero, 207 Ariz. 301, 85 P.3d 1059, ¶¶ 12–15 (Ct. App. 2004) (defendant attacked gas chromatography/mass spectrometry (GC/MS) evidence; court noted courts had accepted GC/MS technology and that challenges went only to test procedures and interpretations of test results).

State v. Morgan, 204 Ariz. 166, 61 P.3d 460, ¶¶ 27–33 (Ct. App. 2002) (claim that expert did not use sufficiently large sample for DNA testing did not go to general acceptance but instead to accuracy of testing procedure; this went to weight and not admissibility of evidence).

Wozniak v. Galati, 200 Ariz. 550, 30 P.3d 131, ¶¶ 5, 9–12 (Ct. App. 2001) (defendant failed to present evidence that drug screen tests are not accepted in scientific community as way to identify presence of drugs; defendant’s evidence went only to how accurate drug screen tests were to show presence of drugs, and that went to weight, not admissibility).

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(e) Particular areas.

702.e.010 When an expert testifies about what is the “standard of care,” that expert’s personal practices in that area may be relevant.

Jaynes v. McConnell, 238 Ariz. 211, 358 P.3d 632, ¶¶ 2–4, 13–19 (Ct. App. 2015) (in April 2007, Dr. G. performed routine gynecological examination on plaintiff, discovered lesion on her recto-vaginal wall, explained lesion was possibly cyst, and that removal was optional; plaintiff was hesitant to have surgery because of risks involved; on May 24, 2007, plaintiff saw Dr. McConnell (Dr. Mc.), who performed transrectal ultrasound (TRUS) and gave written report to Dr. G. and spoke over telephone recommending repeat measurement if mass/cyst was not removed in 3 months; on September 13, 2007, plaintiff returned to Dr. Mc., who performed second TRUS and determined mass/cyst was “relatively unchanged,” when in fact mass/cyst had changed; Dr. Mc. faxed to Dr. G. her interpretation of second TRUS, but did not call Dr. G. to discuss results of this second TRUS; in late 2010, plaintiff sought medical help after experiencing additional symptoms; in January 2011, cyst was diagnosed as Stage IV rectal cancer, which is incurable and would cause plaintiff’s death; Dr. C. appeared as expert witness for Dr. Mc. and testified that standard of care did not require examining doctor to call referring doctor and discuss results; court held trial court erred in precluding Dr. C. from testifying that it was his practice to make such a call and that error was not harmless).

Smethers v. Campion, 210 Ariz. 167, 108 P.3d 946, ¶¶ 28–34 (Ct. App. 2005) (medical malpractice action from LASIK surgery; issue was whether standard of care required patient to stop wearing hard contact lenses for at least a month and then have measurements taken; expert testified that standard of care did not require that waiting period and that doctor could rely on measurements taken over the years; because medical literature suggested standard of care did require waiting period, and because expert testified at trial he would have done same thing as defendant in measuring without requiring waiting period, plaintiff should have been allowed to cross-examine expert about his deposition testimony wherein he said he personally would have waited before taking measurements).

(f) Statutes and Rules.

702.f.010 Under A.R.S. § 12–2602, if a claim against a licensed professional is asserted in a civil action, the claimant (or attorney) shall certify in a written statement filed and served with the claim whether or not expert opinion testimony is necessary to prove the licensed professional’s standard of care or liability for the claim, and if the certification is that expert testimony is necessary, the claimant shall serve a preliminary expert opinion affidavit with the initial Rule 26.1 disclosures.

Hunter Contr. Co. v. Superior Ct., 190 Ariz. 318, 947 P.2d 892 (Ct. App. 1997) (to extent A.R.S. § 12–2602 limits type of expert for the required affidavit, statute is unconstitutional).

702.f.020 Under A.R.S. § 12–2603, if a claim against a health care professional is asserted in a civil action, the claimant (or attorney) shall certify in a written statement filed and served with the claim whether or not expert opinion testimony is necessary to prove the health care professional’s standard of care or liability for the claim, and if the certification is that expert testimony is necessary, the claimant shall serve a preliminary expert opinion affidavit with the initial Rule 26.1 disclosures.

Para v. Anderson, 231 Ariz. 91, 290 P.3d 1214, ¶ 2 (Ct. App. 2012) (plaintiff sued multiple medical corporations and doctors for negligence and wrongful death, and named certain doctor as expert witness who would testify particular defendant doctor’s treatment fell below standard of care).

702.f.021 A defendant may move for summary judgment based on a proposed expert’s lack of requisite qualifications under A.R.S. § 12–2604 without first challenging the sufficiency of the expert affidavit under A.R.S. § 12–2603.

Rasor v. Northwest Hospital LLC, 243 Ariz. 160, 403 P.3d 572, ¶¶ 3–26 (2017) (plaintiff filed medical malpractice action and filed certification verifying need for expert testimony to prove claims pur-

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suant to § 12–2603(A), and subsequently filed preliminary expert affidavit pursuant to § 12–2603(B) identifying RN Ho as her expert on standard of care and causation; after expert disclosure deadline, defendant deposed Ho; plaintiff filed preemptive motion to qualify Ho as expert on standard of care, causation, and prognosis, and alternately asked to identify another expert if trial court precluded any of Ho’s opinion evidence; defendant then moved for summary judgment, arguing Ho did not qualify as expert on standard of care or causation under § 12–2604, and therefore plaintiff could not satisfy her burden on those elements of her claim and case should be dismissed; at oral argument on plaintiff’s motion, trial court found Ho was qualified to testify about standard of care for wounds, but expressed was concerned whether she could testify about causation; trial court subsequently ruled plaintiff could introduce Ho’s expert opinion about wound care, and reserved the remaining issues for summary judgment hearing; at oral argument on motion for summary judgment, plaintiff again requested permission to find another expert if Ho’s qualifications were found wanting; trial court denied that request and granted summary judgment motion without explanation; court held challenging expert’s affidavit under § 12–2603 is not prerequisite for filing summary judgment motion for lack of requisite expert qualifications under § 12–2604, and instead proper recourse for plaintiff whose expert’s qualifications are challenged for first time in summary judgment motion is to seek relief under Rule 56(d)).

702.f.022 If a claimant is required to serve a preliminary expert opinion affidavit and fails to do so, the case is subject to dismissal, but the dismissal is not for failure to prosecute, so dismissal must be without prejudice.

Williamson v. O’Brien, 242 Ariz. 428, 397 P.3d 361, ¶¶ 9–12 (Ct. App. 2017) ((trial court ordered plaintiff to file preliminary expert opinion affidavit by certain date, which plaintiff failed to do; trial court dismissed case with prejudice; court noted *Passmore v. McCarver* held dismissal was for lack of prosecution, but disagrees with that conclusion, and ordered dismissal to be without prejudice), *de p u b l i s h e d*, 243 Ariz. 366, 407 P.3d 1219 (2018).

Boswell v. Fintelmann, 242 Ariz. 52, 392 P.3d 496, ¶¶ 2–8 (Ct. App. 2017) (trial court ordered plaintiff to file preliminary expert opinion affidavit by certain date, which plaintiff failed to do; court stated: “Dismissal for failure to serve the expert affidavit is not tantamount to dismissal for failure to prosecute, which operates as an adjudication on the merits”; court held trial court appropriately dismissed plaintiff’s claim, but erred in dismissing it with prejudice).

702.f.023 If a claimant is required to serve a preliminary expert opinion affidavit and fails to do so, the cases is subject to dismissal, and because the dismissal is for lack of prosecution, the dismissal must be with prejudice.

Passmore v. McCarver, 242 Ariz. 288, 395 P.3d 297, ¶¶ 2–13 (Ct. App. 2017) (in March 2013, plaintiff filed medical malpractice action, but did not file preliminary expert opinion affidavit and received an extension; when plaintiff again did not file affidavit, defendants moved for dismissal; by September 2014, plaintiff still had not filed affidavit, so trial court entered order dismissing case without prejudice; 2 weeks later, plaintiff refiled claim under § 12–504; trial court stated prior dismissal was without prejudice, but in its discretion dismissed the refiled case with prejudice; court held original dismissal was for lack of prosecution: “We hold that when a case is dismissed for failure to serve a preliminary expert affidavit under § 12–2603, the dismissal is for lack of prosecution”; because original dismissal was for lack of prosecution, plaintiff was not entitled to automatic relief under § 12–504; further, trial court did not abuse discretion in denying relief under that section).

702.f.025 A.R.S. § 12–2603 requires the filing of a preliminary expert opinion affidavit, and does not allow for the testimony at a hearing in lieu of an affidavit.

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Romero v. Hasan, 241 Ariz. 385, 388 P.3d 22, ¶¶ 3–9 (Ct. App. 2017) (trial court ordered plaintiff to file preliminary expert opinion affidavit; plaintiff requested that his treating physician testify at hearing in lieu of affidavit; trial court did not err in dismissing plaintiff's claim without prejudice).

702.f.030 Under A.R.S. § 12–2603, if the claimant certifies that expert opinion testimony is necessary to prove the health care professional's standard of care or liability for the claim and identifies the expert who will testify, that expert is subject to deposition, and if the party later re-designates that expert as a consulting expert, that expert is still subject to deposition, but any use of that expert's testimony at trial is subject to limitation under Rule 403.

Para v. Anderson, 231 Ariz. 91, 290 P.3d 1214, ¶¶ 2–15 (Ct. App. 2012) (plaintiff sued multiple medical corporations and doctors for negligence and wrongful death, and named certain doctor as expert witness who would testify particular defendant doctor's treatment fell below standard of care; plaintiff settled with one defendant doctor, whereupon other defendants designated that defendant doctor as non-party at fault and sought to depose expert witness doctor; plaintiff filed notice purporting to name expert witness doctor as consulting expert only and sought to have trial court preclude deposition or other discovery; court held expert witness doctor was still subject to deposition and other discovery, but use of testimony at trial is subject to limitation under Rule 403).

702.f.040 A.R.S. § 12–2604 does not violate the Anti-Abrogation clause of the Arizona Constitution, does not violate right of access to courts, equal protection, or prohibition against special laws, and is therefore constitutional.

Baker v. University Physicians Health, 231 Ariz. 379, 296 P.3d 42, ¶¶ 32–51 (2013) (defendant-physician was a board-certified specialist in pediatrics with a sub-specialty in pediatric hematology-oncology, and was treating 17-year-old patient for blood clots; patient then died from blood clots; plaintiff retained expert witness who was board certified in internal medicine with sub-specialties in oncology and hematology; trial court determined defendant-physician was treating patient within specialized area of pediatric hematology-oncology; court held trial court did not abuse discretion in determining plaintiff's retained expert witness was not qualified to give testimony in relevant area of treatment).

Governale v. Lieberman, 226 Ariz. 443, 250 P.3d 220, ¶¶ 8–25 (Ct. App. 2011) (plaintiff contended defendant doctor committed medical malpractice during surgical procedure; defendant doctor was neurosurgeon; plaintiff's expert witness was board-certified anesthesiologist and pain management specialist; court held trial court properly granted defendant's motion for summary judgment because plaintiff's expert was not of same speciality as defendant doctor).

702.f.050 A.R.S. § 12–2604 applies in an action alleging medical malpractice, and thus applies to an action alleging medical malpractice under the Medical Malpractice Act (MMA), and to an action alleging medical malpractice under the Adult Protective Services Act (APSA).

Cornerstone Hosp. v. Marner, 231 Ariz. 67, 290 P.3d 460, ¶¶ 10–28 (Ct. App. 2012) (decedent, who was vulnerable adult as defined by APSA, received treatment that fell below applicable standard of care; court held A.R.S. § 12–2604 applied, and concluded expert witness who was registered nurse (RN) was qualified to testify about standards of care for RNs, licensed practical nurses (LPN), and certified nursing assistants (CNA)).

702.f.060 A.R.S. § 12–2604 applies in an action alleging medical malpractice, but it does not apply in a disciplinary proceeding against a doctor's medical license for unprofessional conduct under A.R.S. § 32–1401(27)(q).

Kahn v. Arizona Med. Bd., 232 Ariz. 17, 300 P.3d 552, ¶¶ 17–23 (Ct. App. 2013) (plaintiff M.D. was family practitioner, who was alleged to have failed to see his hospital patients on daily basis; at hearing before ALJ, standard-of-care witness was M.D. who practiced internal medicine).

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702.f.065 If the party against whom standard-of-care testimony is offered is or claims to be a specialist or board-certified specialist, then A.R.S. § 12–2604 requires that the expert witness must be a specialist or board-certified specialist and must have devoted a majority of time in the year immediately preceding to occurrence to the active clinical practice in the same health profession as defendant.

Rasor v. Northwest Hospital LLC, 243 Ariz. 160, 403 P.3d 572, ¶¶ 27–33 (2017) (plaintiff contended ICU nurse provided deficient care in failing to take steps to minimize bed pressure and to timely discover pressure ulcer; plaintiff retained as expert board-certified wound-care nurse to testify both on standard of care and causation; court stated it did not have to resolve question whether ICU nurses are considered specialists because plaintiff's expert was not practicing as ICU nurse for year prior to plaintiff's injury; court remanded for court of appeals to determine whether expert testimony on causation was required and possibly remand to trial court to allow plaintiff to seek relief under Rule 56(d)).

St. George v. Plimpton, 241 Ariz. 163, 384 P.3d 1243, ¶¶ 23–27 (Ct. App. 2016) (plaintiffs alleged defendant nurse was negligent in applying pubic pressure during delivery of baby; defendant was licensed registered nurse and certified nurse midwife; plaintiffs' expert was board certified obstetrician/gynecologist; court held trial court correctly ruled that plaintiffs' expert doctor was not qualified under A.R.S. § 12–2604(A) to testify against defendant nurse).

Preston v. Amadei, 238 Ariz. 124, 357 P.3d 720, ¶¶ 10–14 (Ct. App. 2015) (defendant was board-certified in internal medicine, and plaintiff's expert witness was board-certified both in internal medicine and cardiology; because plaintiff's expert witness devoted majority of time in previous year to cardiology, he could not have devoted majority of time in previous year to internal medicine, thus he did not qualify as expert under A.R.S. § 12–2604).

702.f.070 If the party against whom standard-of-care testimony is offered is or claims to be a specialist or board-certified specialist, then A.R.S. § 12–2604 requires that the expert witness must be a specialist or board-certified specialist, and this requirement applies whether or not the party against whom the testimony is offered was acting as a specialist at the time of the occurrence that is the basis for the action.

Cornerstone Hosp. v. Marner, 231 Ariz. 67, 290 P.3d 460, ¶¶ 30–42 (Ct. App. 2012) (decedent, who was vulnerable adult as defined by APSA, received treatment that fell below applicable standard of care; court held A.R.S. § 12–2604 applied, and concluded expert witness who was registered nurse (RN) was qualified to testify about standards of care for RNs, licensed practical nurses (LPN), and certified nursing assistants (CNA)).

Awsienko v. Cohen, 227 Ariz. 256, 257 P.3d 175, ¶¶ 16–18 (Ct. App. 2011) (decedent suffered cardiac arrest and died; defendant Dr. H. was board-certified specialist in cardiovascular disease and interventional cardiology; plaintiffs contended their expert witness did not have to be board-certified specialist in cardiovascular disease or interventional cardiology because (1) Dr. H. never asserted he was acting as specialist at time of alleged malpractice and (2) their expert witness's opinions were unrelated to any cardiac treatment; court rejected plaintiffs' contention, noting that statute only requires that defendant be specialist or board-certified specialist).

702.f.080 Under A.R.S. § 12–2604, if the party against whom standard-of-care testimony is offered is or claims to be a **specialist**, the witness offering testimony must specialize in the same specialty at the time of the **occurrence** that is the basis for the action, but if the party against whom the testimony is offered is or claims to be a **board-certified specialist**, the witness offering testimony must be board-certified specialist only at the time of the **proceedings**.

Awsienko v. Cohen, 227 Ariz. 256, 257 P.3d 175, ¶¶ 8–15 (Ct. App. 2011) (decedent died in 2006; defendant Dr. C. was board-certified in nephrology; plaintiff's expert witness was board-certified in nephrology in 2007; trial court granted motion for summary judgment because expert witness was

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not board-certified at time Dr. C. treated decedent; court reversed because expert witness was board-certified at time of proceedings).

702.f.090 A.R.S. § 12–2604(A) requires a testifying expert specialize in the same specialty or claimed specialty as the treating physician only when the care or treatment at issue was within that specialty, and that includes both specialties and sub-specialties.

Baker v. University Physicians Health., 231 Ariz. 379, 296 P.3d 42, ¶¶ 11–14 (2013) (defendant-physician was a board-certified specialist in pediatrics with a sub-specialty in pediatric hematology-oncology, and was treating 17-year-old patient for blood clots; patient then died from blood clots; plaintiff retained expert witness who was board certified in internal medicine with sub-specialties in oncology and hematology; trial court determined defendant-physician was treating patient within specialized area of pediatric hematology-oncology; court held trial court did not abuse discretion in determining plaintiff's retained expert witness was not qualified to give testimony in relevant area of treatment).

Baker v. University Physicians Health., 228 Ariz. 587, 269 P.3d 1211, ¶¶ 4–15 (Ct. App. 2012), *vacated in part*, 231 Ariz. 379, 296 P.3d 42 (2013).

Lo v. Lee (Mills), 231 Ariz. 531, 298 P.3d 220, ¶¶ 4–14 (Ct. App. 2012) (plaintiff brought suit against defendant doctor who had performed “laser facial skin treatment”; defendant doctor was board-certified ophthalmologist with claimed sub-specialty in oculoplastic surgery; plaintiff's standard-of-care expert was board-certified plastic surgeon; defendant doctor contended plaintiff's expert did not qualify because he was not an ophthalmologist; trial court considered defendant doctor specialist in cosmetic plastic surgery, and considered procedure he performed on plaintiff to fall under that specialty, and thus found plaintiff's board-certified plastic surgeon qualified as witness; on appeal, court noted ABMS description of ophthalmology included surgery, but did not include plastic surgery; defendant doctor acknowledged plastic surgeons performed facial laser resurfacing such as he performed on plaintiff, but contended that, because that procedure also is performed by ophthalmologists with his claimed sub-specialty in oculoplastic surgery, plaintiff was required to have ophthalmologist as expert witness, and thus plaintiff's standard-of-care expert did not qualify because he was not ophthalmologist; defendant doctor asserted he was not claiming specialty in plastic surgery, but was instead ophthalmologist performing cosmetic surgery; based on defendant doctor's claims on website, court concluded he claimed specialty in plastic surgery; court concluded that, when party had multiple specialties, testifying expert did not have to match all specialties and instead only had to match relevant specialty, and thus concluded relevant specialty here was plastic surgery, thus plaintiff's board-certified plastic surgeon satisfied statutory requirement).

702.f.100 Under A.R.S. § 12–2604, “specialty” refers to a limited area of medicine in which a physician is or may become certified, is not limited to the areas of medicine occupied by the 24 American Board of Medical Specialties member boards, and includes sub-specialties; whether relevant “specialty” is area of general certification or sub-specialty certification will depend on circumstances of particular case; “claimed specialty” refers to situations in which a physician purports to specialize in an area that is eligible for board certification, regardless of whether the physician in fact limits his or her practice to that area.

Baker v. University Physicians Health., 231 Ariz. 379, 296 P.3d 42, ¶¶ 15–26 (2013) (defendant-physician was a board-certified specialist in pediatrics with a sub-specialty in pediatric hematology-oncology, and was treating 17-year-old patient for blood clots; patient then died from blood clots; plaintiff retained expert witness who was board certified in internal medicine with sub-specialties in oncology and hematology; trial court determined defendant-physician was treating patient within specialized area of pediatric hematology-oncology; court held trial court did not abuse discretion in determining plaintiff's retained expert witness was not qualified to give testimony in relevant area of treatment).

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702.f.110 In a case in which the treating physician is or claims to be a specialist requires a trial court to make several determinations: (1) The trial court must determine if the care or treatment at issue involves the identified specialty, which may include recognized subspecialties; (2) the trial court must then determine whether the treating physician is board certified, which may include recognized subspecialties; statute does not require testifying expert to have identical certifications as treating physician, but only that the expert be certified in the specialty at issue in the particular case.

Baker v. University Physicians Health, 231 Ariz. 379, 296 P.3d 42, ¶¶ 27–28 (2013) (court notes statute requires testifying expert to devote “majority” of his or her time in year immediately preceding occurrence to specialized area, and because physician cannot devote “majority” of time to more than one specialty, statute suggests only one relevant specialty need be matched).

702.f.120 To withstand a motion for summary judgment or a motion for directed verdict in a malpractice action, unless the defendant’s negligence is so grossly apparent that a lay person would have no difficulty recognizing the negligent conduct, the plaintiff must have evidence showing (1) the general standard of care in the particular area and under similar circumstances, (2) the defendant’s performance fell below the applicable standard of care, and (3) these deviations from the standard of care proximately caused the claimed injury.

Riedisser v. Nelson, 111 Ariz. 542, 544, 534 P.2d 1052, 1054 (1975).

702.f.125 For a party offering causation testimony (as opposed to standard-of-care testimony) the expert witness does not have to meet the standards of A.R.S. § 12–2604; admissibility is instead governed by Rule 702 only.

Rasor v. Northwest Hospital LLC, 244 Ariz. 423, 419 P.3d 956, ¶¶ 12–15 (Ct. App. 2018) (plaintiff’s expert witness had been registered nurse for more than 20 years and had spent first 9 years of her career in coronary care unit of an acute-care hospital, was cross-trained for the ICU, and had gained experience working with patients recovering from open-heart surgery; she was hospital director of wound care at long-term, acute-care hospital for 2 years; her role at that hospital included admission assessments, weekly re-assessments, and care planning; she provided treatments and collaborated with physicians and others for plan and care for patients; she had reviewed plaintiff’s medical records, hospital’s policies for preventing pressure ulcers, and information from nurses regarding their interaction with plaintiff; court held witness was qualified as expert, and any deficiencies in her review of facts of case went to weight not admissibility).

702.f.130 In a medical malpractice case, the plaintiff has the burden of proving its case, and thus there is no burden on the defendant to disprove anything, thus all the defendant’s expert witness need do is testify about other possible causes of the injury.

Benkendorf v. Advanced Card. Spec., 228 Ariz. 528, 269 P.3d 704, ¶¶ 8–18 (Ct. App. 2012) (plaintiff’s expert witness gave opinion that negligently adjusting Coumadin dosages caused death; trial court properly allowed defendant’s expert witness to testify that decedent’s age, hypertension, removal of kidney tumor, and history of stroke were possible causes of death).

Ryan v. San Francisco Peaks Truck. Co., 228 Ariz. 42, 262 P.3d 863, ¶¶ 19–40 (Ct. App. 2011) (court stated these requirements apply equally to defendant asserting that nonparty health care provider negligently caused or contributed to plaintiff’s injury, and held defendant could use affidavits from plaintiff’s experts in its claim that persons plaintiff had originally sued as defendants but with whom plaintiff had settled were non-parties at fault).

Hunter Contr. Co. v. Superior Ct., 190 Ariz. 318, 947 P.2d 892 (Ct. App. 1997) (because contractor’s negligence may be apparent without expert testimony, A.R.S. § 12–2602, which limits type of expert for required affidavit when suing a contractor, is unconstitutional).

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Toy v. Katz, 191 Ariz. 73, 961 P.2d 1021 (Ct. App. 1997) (expert's opinion was that failure of attorney to establish and verify whether person or corporation was client prior to drafting sales agreement fell substantially below standard of practice in area at that time).

702.f.140 Rule 26(b)(4)(D) provides that, unless the parties agree or the court orders otherwise for good cause, each side is presumptively entitled to call only one retained or specially employed expert to testify on an issue; that rule, however, contemplates liberal expansion of its presumptive limitation when an issue cuts across several professional disciplines.

In re Hardt, 242 Ariz. 449, 397 P.3d 1049, ¶¶ 6–17 (Ct. App. 2017) (plaintiff contended defendant was negligent in causing Stage IV ulcers; in its case-in-chief, plaintiff presented Dr. S., board certified in internal medicine and infectious disease, who testified ulcers were preventable through repositioning, wound care, and adequate nutrition, but did not testify about vascular issues; defendant's expert, Dr. G., board certified general and vascular surgeon, testified that plaintiff's ulcers were caused by lack of blood flow that pre-dated plaintiff's admission to defendant's hospital; in rebuttal, plaintiff sought to call Dr. C., vascular surgeon; trial court precluded Dr. C., concluding he was "a duplicative expert"; court held Dr. C. would have testified about matters different than those about which Dr. S. testified, thus trial court erred in precluding Dr. C., and ordered new trial).

Felipe v. Theme Tech Corp., 235 Ariz. 520, 334 P.3d 210, ¶¶ 12–19 (Ct. App. 2014) (because investigating officer described various accident reconstruction methods and his own opinions of speeds of vehicles based on his reconstruction, he testified as expert; court held "independent expert" under Rule 26(b)(4)(D) is person retained for purpose of offering expert testimony; because officer was not retained by plaintiffs, he was not plaintiffs' one independent expert).

702.f.150 Under Rule 1(D)(4), Uniform Rules of Practice for Medical Malpractice Cases, if a party lists a witness for one area, that should not preclude the party from using that witness to testify in another area.

Perguson v. Tamis, 188 Ariz. 347, 937 P.2d 347 (Ct. App. 1996) (plaintiff listed first doctor as causation witness and second doctor as standard of care witness; trial court erred in precluding plaintiff from having second doctor, rather than first doctor, give opinion on causation).

702.f.160 Meeting the statutory criteria is not the exclusive means of admitting breath test results in evidence, thus a party may have such evidence admitted if it complies with the rules of evidence pertaining to scientific evidence.

State v. Superior Ct. (Pawlowicz), 195 Ariz. 555, 991 P.2d 258, ¶¶ 10–11 (Ct. App. 1999) (although state could not establish statutory foundation for admission of test results from Intoxilyzer 5000 AD-AMS, trial court erred in suppressing test results without giving state opportunity to establish foundation under Arizona Rules of Evidence).

April 1, 2020

Rule 703. Bases of an Expert's Opinion Testimony.

An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.

Comment to 2012 Amendment

The language of Rule 703 has been amended to conform to the federal restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

All references to an “inference” have been deleted on the grounds that the deletion made the rule flow better and easier to read, and because any “inference” is covered by the broader term “opinion.” Courts have not made substantive decisions on the basis of any distinction between an opinion and an inference. No change in current practice is intended.

Comment to Original 1977 Rule

This rule, along with others in this article, is designed to expedite the reception of expert testimony. Caution is urged in its use. Particular attention is called to the Advisory Committee's Note to the Federal Rules of Evidence which accompanies Federal Rule 703. In addition, it should be emphasized that the standard “if of a type reasonably relied upon by experts in the particular field” is applicable to both sentences of the rule. The question of whether the facts or data are of a type reasonably relied upon by experts is in all instances a question of law to be resolved by the court prior to the admission of the evidence. If the facts or data meet this standard and form the basis of admissible opinion evidence they become admissible under this rule for the limited purpose of disclosing the basis for the opinion unless they should be excluded pursuant to an applicable constitutional provision, statute, rule or decision.

Evidence that is inadmissible except as it may qualify as being “reasonably relied upon by experts in the particular field” has traditionally included such things as certain medical reports and comparable sales in condemnation actions.

Cases

703.010 If the party offering the evidence establishes that experts in a particular field would reasonably rely on certain kinds of facts or data in forming an opinion on the subject, those facts or data need not be admissible for the opinion to be admitted.

State v. Tucker, 215 Ariz. 298, 160 P.3d 177, ¶¶ 52–59 (2007) (state's materials expert testified that duct tape used to gag victim was for industrial use, and testified he based opinion in part on conversations he had with manufacturer's sales representatives; because information from sales representatives was of type upon which experts would reasonably rely, admission of that information was proper).

State v. Smith, 215 Ariz. 221, 159 P.3d 531, ¶¶ 21–23 (2007) (to prove the especially heinous, cruel, or depraved aggravating circumstance, state presented testimony of medical examiner, who relied on findings and opinions of medical examiner from 1976; because this was type of information upon which experts in this area reasonably rely, trial court did not err in permitting expert to testify about findings and opinions of medical examiner from 1976).

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State v. Roque, 213 Ariz. 193, 141 P.3d 368, ¶ 56 (2006) (for charge of first-degree murder, state's theory of case was that shootings were intentional acts of racism while intoxicated, while defendant pursued insanity defense; in assessing defendant's mental health, state's expert considered defendant's 1983 conviction for attempted robbery; court noted that evidence of prior conviction could be disclosed to jurors as forming basis of opinion without regard to its independent admissibility).

State v. Rogovich, 188 Ariz. 38, 932 P.2d 794 (1997) (medical examiner testified based on report done by doctor who was no longer on staff; court held such reliance was permissible, and that facts or data need not be generated by a qualified, testifying expert).

State v. Meeds, 244 Ariz. 454, 421 P.3d 653, ¶ 17 (Ct. App. 2018) (court held trial court did not abuse discretion in allowing gang expert to rely on prior police investigation reports in forming opinion that defendant met at least four criteria for membership in criminal street gang).

State v. Pesqueira, 235 Ariz. 470, 333 P.3d 797, ¶¶ 5–14 (Ct. App. 2014) (in forming opinion about cause of death, state's medical expert based opinion in part on autopsy report generated in Mexico; court held defendant's concerns about inaccuracies went to weight and credibility of expert's testimony and were questions of fact for jurors' determination).

Sandretto v. Payson Health. Mgmt., 234 Ariz. 351, 322 P.3d 168, ¶¶ 28–32 (Ct. App. 2014) (defendant contended plaintiff's expert on cost of future medical care did not base opinion on sufficient facts; court noted “[t]here is no requirement that the facts or data be part of the trial testimony,” and concluded expert based opinion on sufficient facts).

Pipher v. Loo, 221 Ariz. 399, 212 P.3d 91, ¶¶ 7–11 (Ct. App. 2009) (court held trial court properly allowed expert witness to give opinion based on his own laboratory research, clinical experience, and interviews with patients and their dentists, even though some of this information was hearsay).

Brethauer v. General Motors Corp., 221 Ariz. 192, 211 P.3d 1176, ¶¶ 18–20 (Ct. App. 2009) (trial court precluded 3-minute videotaped collage of 10 GM-conducted tests on seat belt systems containing same buckle as involved in subject litigation because either other seat belt systems had different types of belts or the circumstances of test were different; plaintiff contended trial court erred in precluding videotape because his expert relied on videotape in forming his opinion; court stated mere reliance by expert on data does not automatically make data admissible).

Mohave Elec. Coop. v. Byers, 189 Ariz. 292, 942 P.2d 451 (Ct. App. 1997) (in ruling on motion for summary judgment, trial court could consider audit report upon which expert relied).

State v. Curry, 187 Ariz. 623, 931 P.2d 1133 (Ct. App. 1996) (one expert witness permitted to give opinion based in part on child sexual abuse accommodation syndrome research done by another; another expert witness permitted give opinion about victim based on personal examination of victim done by another doctor).

703.030 Questions about the accuracy and reliability of a witness's factual basis, data, and methods go to the weight and credibility of the witness's testimony, and are questions of fact for the jurors' determination.

Logerquist v. McVey (Danforth), 196 Ariz. 470, 1 P.3d 113, ¶¶ 51–52 (2000) (court noted that Arizona Constitution preserved right to have jurors pass upon questions of fact by determining credibility of witnesses and the weight of conflicting evidence).

State v. Pesqueira, 235 Ariz. 470, 333 P.3d 797, ¶¶ 5–14 (Ct. App. 2014) (in forming opinion about cause of death, state's medical expert based opinion in part on autopsy report generated in Mexico; court held defendant's concerns about inaccuracies went to weight and credibility of expert's testimony and were questions of fact for jurors' determination).

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Pipher v. Loo, 221 Ariz. 399, 212 P.3d 91, ¶¶ 16–18 (Ct. App. 2009) (expert witness testified he was board certified with 35 years' experience, had given thousands of injections of type at issue, and had number of patients with type of injury at issue; trial court precluded expert's testimony because it concluded testimony lacked foundation, was speculative, and lacked adequate basis under Rules 702 and 703; court held that trial court erred in excluding this testimony and remanded for new trial).

T.W.M. Custom Framing v. Industrial Comm'n, 198 Ariz. 41, 6 P.2d 745, ¶¶ 18–20 (Ct. App. 2000) (decedent-employee committed suicide, and issue was whether decedent-employee's industrial injury so deprived him of normal judgment that his action in committing suicide would not be considered "purposeful" and thus would entitle his widow and child to collect death benefits; psychiatrist conducted psychiatric autopsy and testified that decedent's depressed mental condition resulted from his work-related injuries; employer contended that foundation for psychiatrist's testimony was inadequate because he relied heavily on widow's testimony to formulate his opinions; court noted psychiatrist also relied medical records, police reports, and prior testimony, and concluded there was appropriate foundation for opinion).

Standard Chartered PLC v. Price Waterhouse, 190 Ariz. 6, 945 P.2d 317 (Ct. App. 1996) (in litigation over sale of bank, plaintiff-purchaser claimed that defendant-seller's \$23 million loss reserve figure understated amount of uncollectible loans; defendant-seller sought to introduce tax filing made by plaintiff-purchaser 1½ years after sale showing a loss reserve of \$9.8 million; trial court excluded this evidence because defendant-seller's expert witness could not testify to what plaintiff-purchaser actually did in preparing tax filing and could only testify about what plaintiff-purchaser should have done; court held there was sufficient factual basis for the evidence and thus it should have been admitted, and that any dispute about \$9.8 million figure went to weight and not admissibility of opinion).

703.035 An expert may not base an opinion on sheer speculation, thus the trial court should not admit a conclusory opinion based on no facts.

Aida Renta Trust v. Maricopa County, 221 Ariz. 603, 212 P.3d 941, ¶¶ 18–21 (Ct. App. 2009) (taxpayers brought action for property tax discrimination; trial court granted summary judgment for taxpayers concluding that county had engaged in deliberate and systematic conduct that resulted in greatly disproportionate tax treatment; county contended issue of fact was created by affidavit from appraiser employed by county, which stated that she did not know exactly what had happened, but it must have been an accident; court held that, because opinion in this affidavit was based on speculation, affidavit was not admissible, so it did not create any issue of material fact).

703.080 An expert witness may disclose the facts or data if the party offering the evidence establishes that experts in a particular field would reasonably rely on certain kinds of facts or data in forming an opinion on the subject.

State v. Carlson, 237 Ariz. 381, 351 P.3d 1079, ¶ 28 (2015) (trial court precluded expert from testifying that defendant told him he falsely confessed and defendant's explanation why he did so; because defendant never established experts in field of false confessions would reasonably rely on defendant's own statement that confession was false, trial court did not abuse discretion in precluding testimony).

State v. Smith, 215 Ariz. 221, 159 P.3d 531, ¶¶ 21–23 (2007) (to prove the especially heinous, cruel, or depraved aggravating circumstance, state presented testimony of medical examiner, who relied on findings and opinions of medical examiner from 1976; because this was type of information upon which experts in this area reasonable rely, trial court did not err in permitting expert to testify about findings and opinions of medical examiner from 1976).

In re Leon G., 199 Ariz. 375, 18 P.3d 169, ¶ 11 (Ct. App. 2001) (issue was whether person was likely to commit further acts of sexual violence; doctor permitted to rely on person's past improper sexual activities in forming opinion, and was permitted to disclose factual basis for that opinion).

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703.085 If the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jurors only if their probative value in helping the jurors evaluate the opinion substantially outweighs their prejudicial effect.

Taylor-Bertling v. Foley, 233 Ariz. 394, 313 P.3d 537, ¶¶ 3–6 (Ct. App. 2013) (because “Life Safety Code” had not been adopted in Pima County, and because of potential for confusion and possibility jurors may give undue weight to testimony once they heard it was based on “Code,” trial court concluded probative value did not outweigh prejudicial effect; appellant’s argument why that evidence should have been admitted essentially asked appellate court to re-weigh what trial court had done, which appellate court did not want to do).

703.090 An expert witness may disclose the facts or data only for limited purpose of disclosing the basis of the opinion and not as substantive evidence.

State v. Snelling, 225 Ariz. 182, 236 P.3d 409, ¶¶ 18–20 (2010) (victim was killed in 1996, but police did not identify defendant as suspect until 2003; defendant contended medical examiner’s testimony in 2007 violated his right of confrontation because she had not performed victim’s autopsy in 1996 nor authored autopsy report; medical examiner testified she formed her own opinion and that 1996 autopsy report was only part of basis for her opinion; court held medical examiner’s testimony was not hearsay and did not violate defendant’s right of confrontation).

State v. Hummert, 188 Ariz. 119, 933 P.2d 1187 (1997) (court noted that otherwise inadmissible scientific evidence would not be admitted as substantive evidence).

703.095 If an expert witness discloses the facts or data only for the limited purpose of disclosing the basis of the opinion, they are not substantive evidence and admission of those facts and data does not violate the right of confrontation, and because they are not admitted to prove the truth of the matter asserted, they are not hearsay.

State v. Guarino, 238 Ariz. 437, 362 P.3d 484, ¶¶ 33–35 (2015) (state’s gang experts were permitted to base opinions on information from debriefings, free talks, wire taps, and letter interceptions from gang members, and learned in undercover capacity from gang members).

State v. Joseph, 230 Ariz. 296, 283 P.3d 27, ¶¶ 7–13 (2012) (to prepare for testimony, medical examiner reviewed autopsy report prepared by doctor who did not testify; because (1) autopsy report was not admitted in evidence, (2) medical examiner used facts only as basis of his opinion, and (3) medical examiner formed his own opinion, allowing medical examiner to testify based on that autopsy report did not violate defendant’s right of confrontation).

State v. Dixon, 226 Ariz. 545, 250 P.3d 1174, ¶¶ 33–37 (2011) (Dr. H.K. conducted autopsy in 1978; at trial held 11/13/07, Dr. P.K. testified based on his review of autopsy report and photographs, neither of which were admitted in evidence; court rejected defendant’s contention that Dr. P.K.’s testimony violated his right of confrontation).

State v. Gomez, 226 Ariz. 165, 244 P.3d 1163, ¶¶ 22–24 (2010) (senior forensic analyst who was laboratory supervisor testified in detail about laboratory’s operating procedures, standards, and safeguards, and although she did not witness all steps in process, she checked technicians’ records for any deviations from laboratory’s protocols, and then personally performed final step in process, interpretation and comparison, which was only step that required human analysis; court held senior analyst’s testimony did not violate Confrontation Clause).

State v. Snelling, 225 Ariz. 182, 236 P.3d 409, ¶¶ 18–20 (2010) (victim was killed in 1996, but police did not identify defendant as suspect until 2003; defendant contended medical examiner’s testimony in 2007 violated his right of confrontation because she had not performed victim’s autopsy in 1996 nor authored autopsy report; medical examiner testified she formed her own opinion and that 1996

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autopsy report was only part of basis for her opinion; court held medical examiner's testimony was not hearsay and did not violate defendant's right of confrontation).

State v. Tucker, 215 Ariz. 298, 160 P.3d 177, ¶¶ 45–50 (2007) (defendant contended written descriptions on some photographs in montage of 44 photographs showing corpses and autopsies were hearsay statements; because photographs and statements were not offered to prove truth of matters asserted, statements were not hearsay).

State v. Smith, 215 Ariz. 221, 159 P.3d 531, ¶¶ 21–23, 26 (2007) (to prove especially heinous, cruel, or depraved aggravating circumstance, state presented testimony of medical examiner, who relied on medical examiner's 1976 findings and opinions; because this was type of information upon which experts in this area reasonable rely, trial court did not err in permitting expert to testify about those findings and opinions, and this testimony did not violate Confrontation Clause).

State ex rel. Montgomery v. Karp (Voris), 236 Ariz. 120, 336 P.3d 753, ¶¶ 2–19 (Ct. App. 2014) (criminalist L.K. analyzed defendant's blood sample using gas chromatograph; by time of trial, L.K. had moved out of state and left profession; court held criminalist J.V. could give her opinion of defendant's BAC based on L.K.'s examination notes and reports, chromatogram from blood sample L.K. analyzed, printouts from quality control samples, and summary of quality assurance for blood-alcohol sequence that L.K. had performed on defendant's blood sample).

State v. Pesqueira, 235 Ariz. 470, 333 P.3d 797, ¶¶ 15–19 (Ct. App. 2014) (in forming opinion about cause of death, state's medical expert based opinion in part on autopsy report generated in Mexico; court held, because autopsy report was not offered to establish some fact, it was not testimonial and thus testimony about autopsy report did not violate Confrontation Clause).

703.110 Although an expert witness is allowed to disclose facts or data not admissible in evidence if they are of the type upon which experts reasonably rely, the expert should not be allowed to act merely as a conduit for the other expert's opinion and thus circumvent the requirements excluding certain types of hearsay statements.

State v. Goudeau, 239 Ariz. 421, 372 P.3d 945, ¶¶ 147–49 (2016) (defendant contended trial court erred by allowing expert to testify that, as part of “second chair process,” another unidentified PPD firearms examiner “agreed with his identification”; court held expert did not act as mere “conduit” for other examiner's opinion, and it was instead part of verification process PPD crime laboratory generally followed in this type of case).

State v. Gomez, 226 Ariz. 165, 244 P.3d 1163, ¶¶ 22–23 (2010) (senior forensic analyst who was laboratory supervisor testified in detail about laboratory's operating procedures, standards, and safeguards, and although she did not witness all steps in process, she checked technicians' records for any deviations from laboratory's protocols, and then personally performed final step in process, interpretation and comparison, which was only step that required human analysis; court held senior analyst formed her own opinion and did not act merely as conduit for opinions of others).

State v. Snelling, 225 Ariz. 182, 236 P.3d 409, ¶¶ 18–20 (2010) (victim was killed in 1996, but police did not identify defendant as suspect until 2003; defendant contended medical examiner's testimony in 2007 violated his right of confrontation because she had not performed victim's autopsy in 1996 nor authored autopsy report; medical examiner testified she formed her own opinion and that 1996 autopsy report was only part of basis for her opinion; court held medical examiner's testimony was not hearsay and did not violate defendant's right of confrontation).

State v. Smith, 215 Ariz. 221, 159 P.3d 531, ¶¶ 21–25 (2007) (to prove especially heinous, cruel, or depraved aggravating circumstance, state presented testimony of medical examiner, who relied on findings and opinions of medical examiner from 1976; because record showed testifying medical examiner formed own opinion based on facts and evidence in addition to findings and opinions of pre-

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vious medical examiner, testifying medical examiner did not act merely as conduit for previous medical examiner's findings and opinions).

State v. Smith, 242 Ariz. 98, 393 P.3d 159, ¶¶ 6–13 (Ct. App. 2017) (technician K.L. conducted saliva tests on victim's underwear and submitted test results to analyst B.S., who testified at trial basing testimony in part on K.L.'s test results; because B.S. testified at trial, but had not done any independent analysis of test results, her testimony was hearsay and violated defendant's right of confrontation).

In re Thomas R., 224 Ariz. 579, 233 P.3d 1158, ¶¶ 39–41 (Ct. App. 2010) (in SVP proceeding, expert based opinion on numerous factors, one of which was other expert's DNA report; because other expert's conclusion in DNA report was only one of several factors upon which testifying expert relied, testifying expert did not act merely as conduit for other expert's opinion).

703.115 This rule does not authorize admitting hearsay on the pretense that it is the basis for the expert's opinion when the expert adds nothing to the out-of-court statement other than transmitting it to the jurors.

State v. Carlson, 237 Ariz. 381, 351 P.3d 1079, ¶¶ 22–29 (2015) (trial court precluded expert from testifying that defendant told him he falsely confessed and defendant's explanation why he did so; because (1) expert would not have provided any additional insight or information about those statements and (2) defendant could not have testified about those statements without submitting to cross-examination, trial court did not abuse discretion in precluding that testimony).

703.130 Once an expert has given an opinion, the other party may cross-examine the expert about matters the expert considered but rejected in forming the opinion.

Standard Chartered PLC v. Price Waterhouse, 190 Ariz. 6, 945 P.2d 317 (Ct. App. 1996) (in litigation over sale of bank, plaintiff-purchaser claimed that \$23 million loss reserve figure supplied by defendant-seller understated amount of uncollectible loans; defendant-seller sought to introduce tax filing made by plaintiff-purchaser 1½ years after sale showing a loss reserve of \$9.8 million; trial court excluded this evidence because defendant-seller's expert witness could not testify to what plaintiff-purchaser actually did in preparing tax filing and could only testify about what plaintiff-purchaser should have done; court held there was sufficient factual basis for the evidence and thus it should have been admitted, and that plaintiff-purchaser could have used any contrary evidence in cross-examination).

703.140 An expert witness may not be cross-examined on the basis of facts or data upon which the expert did not rely in formulating the opinion, when the material is itself inadmissible.

Cervantes v. Rijlaarsdam, 190 Ariz. 396, 400–01, 949 P.2d 56, 60–61 (Ct. App. 1997) (although expert read report, he did not consider or rely on it, thus trial court properly precluded cross-examining expert about report).

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Rule 704. Opinion on an Ultimate Issue.

(a) In General--Not Automatically Objectionable. An opinion is not objectionable just because it embraces an ultimate issue.

(b) Exception. In a criminal case, an expert witness must not state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense. Those matters are for the trier of fact alone.

Comment to 2012 Amendment

Subsection (b) has been added to conform to Federal Rule of Evidence 704, which was amended in 1984 to add comparable language. The new language in the Arizona rule is considered to be consistent with current Arizona law.

Additionally, the language of Rule 704 has been amended to conform to the federal restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent in the restyling to change any result in any ruling on evidence admissibility.

The Court deleted the reference to an “inference” on the grounds that the deletion made the rule flow better and easier to read, and because any “inference” is covered by the broader term “opinion.” Courts have not made substantive decisions on the basis of any distinction between an opinion and an inference. No change in current practice is intended.

Comment to Original 1977 Rule

Some opinions on ultimate issues will be rejected as failing to meet the requirement that they assist the trier of fact to understand the evidence or to determine a fact in issue. Witnesses are not permitted as experts on how juries should decide cases.

Cases

704.010 Opinion evidence is admissible even if it involves an ultimate issue in the case.

State v. Chappell, 225 Ariz. 229, 236 P.3d 1176, ¶¶ 16–18 (2010) (state alleged killing was especially cruel; medical examiner testified that drowning was “horrible experience” and “10” on “scale of 1 to 10”; defendant contended this was improper opinion on ultimate issue; court noted testimony was about experience of drowning and not opinion whether victim suffered, thus comments were neither improper nor embracing ultimate issue).

Fuenning v. Superior Ct., 139 Ariz. 590, 680 P.2d 121 (1983) (in DUI case, police officer may give opinion defendant displayed symptoms of intoxication, but should not give opinion defendant was driving while intoxicated, which amounts to giving opinion on defendant’s guilt).

State v. Meeds, 244 Ariz. 454, 421 P.3d 653, ¶¶ 13–16 (Ct. App. 2018) (court held trial court did not abuse discretion in allowing gang expert to give opinion that, based on his knowledge and experience of Lindo Park Crips, and based on his review of evidence and his observations at trial, defendant met at least four criteria for membership in criminal street gang).

State v. Williamson, 236 Ariz. 550, 343 P.3d 1, ¶¶ 27–31 (Ct. App. 2015) (officer’s testimony that, in sting operation, they are trained to tell person that person has opportunity to walk away because “we try to get away from the entrapment issue” was not opinion on ultimate issue of defendant’s guilt).

State v. Welch, 236 Ariz. 308, 340 P.3d 387, ¶¶ 20–25 (Ct. App. 2014) (although expert said someone must have downloaded files on defendant’s computer, this was no opinion on ultimate issue because question was, who downloaded files).

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State v. Fornof, 218 Ariz. 74, 179 P.3d 954, ¶¶ 20–21 (Ct. App. 2008) (officer testified defendant had 43 grams of cocaine base that was worth \$4,360, cash in predominately \$20 bills, and no means of smoking that cocaine; trial court did not err in allowing expert witness to testify based on that evidence that defendant possessed the cocaine for sale rather than personal use).

State v. Campoy (Cordova), 214 Ariz. 132, 149 P.3d 756, ¶¶ 6–12 (Ct. App. 2006) (in DUI trial; trial court abused discretion in ruling state’s witnesses could not use such terms as “impairment,” “sobriety,” “tests,” “pass/fail,” “marginal,” or “field sobriety test” when testifying about FSTs).

State v. Lummus, 190 Ariz. 569, 950 P.2d 1190 (Ct. App. 1997) (court concerned that officer testified defendant was 10+ on intoxication scale of 1 to 10, but any error harmless beyond reasonable doubt).

Souza v. Fred Carriers Contracts, Inc., 191 Ariz. 247, 955 P.2d 3 (Ct. App. 1997) (accident reconstruction expert should have been permitted to give opinion on how and why accident happened; trial court therefore erred in granting defendant’s motion for summary judgment).

State v. Corona, 188 Ariz. 85, 932 P.2d 1356 (Ct. App. 1997) (expert testimony on how a person can promote a gang by stating name of gang and by making threats did not amount to telling jurors how to decide the case).

State v. Carreon, 151 Ariz. 615, 617, 729 P.2d 969, 971 (Ct. App. 1986) (police officer permitted to give opinion that, based on way that defendant carried cocaine and money, drugs were possessed for sale).

704.020 Testimony must assist the jurors to understand the evidence or to determine a fact in issue and not merely tell the jurors how they should decide the case.

State v. Blakley, 204 Ariz. 429, 65 P.3d 77, ¶¶ 33–39 (2003) (trial court permitted expert witness to testify about police interrogation tactics and their coercive effect court held trial court did not abuse discretion in precluding expert from giving opinion on whether tactics in this case were coercive and giving opinion whether defendant’s confession was voluntary).

State v. Sosnowicz, 229 Ariz. 90, 270 P.3d 917, ¶¶ 15–26 (Ct. App. 2012) (defendant drove vehicle over victim, and claimed it was accident; state claimed defendant either intentionally, knowingly, or recklessly drove over victim; medical examiner testified manner of death was homicide; because medical examiner’s opinion was based on information he had received from police officers and not on any specialized knowledge or personal examination of body, court held that testimony essentially was ultimate issue in case and did not assist jurors in determining case, thus trial court should not have admitted that testimony, but any error was harmless).

Webb v. Omni Block Inc., 216 Ariz. 349, 166 P.3d 140, ¶¶ 11–22 (Ct. App. 2007) (court held that trial court erred in allowing defendant’s expert witness to give opinion on percentage of fault to be attributed to each party, and error required reversal).

State v. Herrera, 203 Ariz. 131, 51 P.3d 353, ¶¶ 7–8 (Ct. App. 2002) (while testifying about FSTs, officer stated, “I felt he was impaired to the slightest degree”; court held officer’s testimony was impermissible, but trial court did not err in denying motion for mistrial because trial court immediately struck officer’s testimony and gave detailed curative instruction, and in final instruction repeated that curative instruction and told jurors to disregard any stricken testimony).

State v. Lummus, 190 Ariz. 569, 950 P.2d 1190 (Ct. App. 1997) (court concerned officer testified defendant was 10+ on intoxication scale of 1 to 10, but held error was harmless).

State v. Reimer, 189 Ariz. 239, 941 P.2d 912 (Ct. App. 1997) (when victim testified to different version, trial court erred in allowing officer to opine that victim was not lying when she gave previous version).

704.025 Although results of field sobriety tests (FSTs) are not admissible to quantify an accused’s blood alcohol concentration, they are relevant evidence of an accused’s impairment, thus an officer may testify about the manner in which defendant performed the FSTs, and may testify they administered FSTs in an attempt to determine whether defendant was in fact intoxicated and was intoxicated while driving.

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State v. Campoy (Cordova), 214 Ariz. 132, 149 P.3d 756, ¶¶ 6–12 (Ct. App. 2006) (in DUI trial; trial court abused discretion in ruling state’s witnesses could not use such terms as “impairment,” “sobriety,” “tests,” “pass/fail,” “marginal,” or “field sobriety test” when testifying about FSTs).

704.030 An expert may testify about behavioral characteristics of certain classes of persons, but may not give an opinion about the accuracy, reliability, or truthfulness of a particular person, or quantify the percentage of such persons who are truthful.

State v. Lynch, 238 Ariz. 84, 357 P.3d 119, ¶¶ 13–15 (2015) (questions related to expert’s witness interviews and not to testimony of those witnesses, thus questions did not deny defendant fair trial).

State v. Lujan, 192 Ariz. 448, 967 P.2d 123, ¶¶ 8–9, 11–13, 16, 20–21 (1998) (because defendant admitted playing with victim in swimming pool but denied ever touching victim’s private parts, defendant was entitled to show victim was hypersensitive to interaction with adult males and thus may have mis-perceived her physical contact with defendant, and thus should have been allowed to introduce expert testimony about how victim’s nearly contemporaneous sexual abuse by others may have caused victim to mis-perceived defendant’s actions).

State v. Jacobson, 244 Ariz. 187, 418 P.3d 960, ¶ 12 (Ct. App. 2017) (defendant fatally shot her live-in boyfriend while he was lying in bed; in severance proceedings, doctors diagnosed defendant with PTSD; for criminal proceedings, court noted diagnosis was based solely on defendant’s statements to doctors that boyfriend had abused her and not on any outside observations, and that defendant had omitted key information; court held PTSD diagnosis only served to vouch for defendant’s credibility and therefore was not admissible).

State v. Reimer, 189 Ariz. 239, 941 P.2d 912 (Ct. App. 1997) (victim gave version when testifying; trial court erred in allowing officer to give opinion that victim was not lying when she gave earlier version).

704.035 Although an expert may not give an opinion about the accuracy, reliability, or truthfulness of a particular person, a witness may disclose to jurors those facts that caused the witness not to believe a particular person.

State v. Doerr, 193 Ariz. 56, 969 P.2d 1168, ¶¶ 25–27 (1998) (on cross-examination, defendant elicited testimony from officer that he did not believe defendant was truthful during questioning on day of arrest; on rebuttal, state permitted to ask officer why he did not believe defendant was being truthful).

State v. Martinez, 230 Ariz. 382, 284 P.3d 893, ¶¶ 10–13 (Ct. App. 2012) (after defendant fled, he called police and reported his vehicle had been stolen; in opening statement and on cross-examination of officer, defendant’s attorney implied officer was less than diligent in his investigation of stolen vehicle claim; officer permitted to testify defendant’s actions were standoffish and odd, and defendant’s “story did not match up; it seemed like [defendant] was being evasive and lying”; court held officer’s testimony was necessary to explain why officer did not continue to investigate alleged stolen vehicle).

704.040 An expert may give an opinion of the defendant’s state of mind at the time of the offense only when the defendant raises an insanity defense.

State v. Mott, 187 Ariz. 536, 931 P.2d 1046 (1997) (defendant was charged with child abuse for failure to seek treatment for her child after child was injured while in care of defendant’s boyfriend; defendant wanted to introduce evidence that her condition as battered woman caused her to form “traumatic bond” with boyfriend, caused her to feel hopeless and depressed and that she could not escape, interfered with her ability to sense danger and protect others, and caused her to believe what boyfriend told her and to lie to protect him, all of which would preclude her from forming necessary intent; court held this was merely another form of diminished capacity, which legislature has refused to adopt, thus evidence was not admissible).

State v. Wright, 214 Ariz. 540, 155 P.3d 1064, ¶¶ 6–7 (Ct. App. 2007) (defendant was charged with theft of means of transportation, which requires knowingly controlling vehicle with intent to deprive permanently; defendant sought to introduce expert testimony that his “mental capacity was lowered and

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that he is a naive-type of person” and thus could not have mental state necessary to commit crime; court held that *State v. Mott* precluded evidence of diminished capacity defense).

704.045 Although an expert may not give an opinion about the defendant’s state of mind on the issue of *mens rea*, an expert may testify about the defendant’s behavior that the expert observed (“observation evidence”).

State v. Richter, 245 Ariz. 1, 424 P.3d 402, ¶¶ 32–37 (2018) (defendant was convicted of kidnapping and child abuse; court noted it upheld admissibility of observation evidence to rebut *mens rea*, which is necessarily subjective element, but stated that, because duress requires objective inquiry, and because evidence of “a defendant’s tendency to think in a certain way or his [or her] behavioral characteristics” is inherently subjective, it concluded that observation evidence is likely not admissible to support duress defense).

State v. Jacobson, 244 Ariz. 187, 418 P.3d 960, ¶¶ 6–20 (Ct. App. 2017) (defendant fatally shot her live-in boyfriend in head while he was lying in bed; in severance proceedings, doctors diagnosed defendant with PTSD; for criminal proceedings, court held PTSD diagnosis was opinion testimony going to mental defect and its effect on cognitive or moral capacities on which sanity depends, and thus was not admissible, and disagreed with *Richter* court that such testimony was admissible as observation evidence).

State v. Wright, 214 Ariz. 540, 155 P.3d 1064, ¶¶ 11–12, 15–17 (Ct. App. 2007) (defendant charged with theft of means of transportation, which required knowingly controlling vehicle with intent to deprive permanently; defendant sought to introduce expert testimony that his “mental capacity was lowered and that he is a naive-type of person” and thus could not have mental state necessary to commit crime; court concluded that expert testimony was about defendant’s mental capacity generally and did not constitute observation evidence about defendant’s relevant behavioral characteristics bearing on defendant’s state of mind at time of offense, thus trial court properly precluded this evidence).

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Rule 705. Disclosing the Facts or Data Underlying an Expert's Opinion.

Unless the court orders otherwise, an expert may state an opinion—and give the reasons for it—without first testifying to the underlying facts or data. But the expert may be required to disclose those facts or data on cross-examination.

Comment to 2012 Amendment

The language of Rule 705 has been amended to conform to the federal restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

The reference to an “inference” has been deleted on the grounds that the deletion made the rule flow better and easier to read, and because any “inference” is covered by the broader term “opinion.” Courts have not made substantive decisions on the basis of any distinction between an opinion and an inference. No change in current practice is intended.

Cases

705.020 A witness may disclose the facts or data upon which the witness relied, but only for the limited purpose of disclosing the basis of the opinion and not as substantive evidence.

State v. Hummert, 188 Ariz. 119, 933 P.2d 1187 (1997) (court noted that otherwise inadmissible scientific evidence would not be admitted as substantive evidence).

705.040 An expert witness may be cross-examined about facts or data the expert considered in formulating the opinion, and about facts or data the expert considered but rejected in formulating the opinion.

Standard Chartered PLC v. Price Waterhouse, 190 Ariz. 6, 945 P.2d 317 (Ct. App. 1996) (in litigation over sale of bank, plaintiff-purchaser claimed that \$23 million loss reserve figure supplied by defendant-seller understated amount of uncollectible loans; defendant-seller sought to introduce tax filing made by plaintiff-purchaser 1½ years after sale showing a loss reserve of \$9.8 million; trial court excluded this evidence because defendant-seller's expert witness could not testify to what plaintiff-purchaser actually did in preparing tax filing and could only testify about what plaintiff-purchaser should have done; court held there was sufficient factual basis for the evidence and thus it should have been admitted, and that plaintiff-purchaser could have used any contrary evidence in cross-examination).

705.050 An expert witness may not be cross-examined on the basis of facts or data upon which the expert did not rely in formulating the opinion, when the material is itself inadmissible.

Cervantes v. Rijlaarsdam, 190 Ariz. 396, 949 P.2d 56 (Ct. App. 1997) (although expert read report, he did not consider or rely on it, thus trial court properly precluded cross-examining expert about report).

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Rule 706. Court Appointed Expert Witnesses.

(a) Appointment Process. On a party's motion or on its own, the court may order the parties to show cause why expert witnesses should not be appointed and may ask the parties to submit nominations. The court may appoint any expert that the parties agree on and any of its own choosing. But the court may only appoint someone who consents to act.

(b) Expert's Role. The court must inform the expert of the expert's duties. The court may do so in writing and have a copy filed with the clerk or may do so orally at a conference in which the parties have an opportunity to participate. The expert:

- (1) must advise the parties of any findings the expert makes;
- (2) may be deposed by any party;
- (3) may be called to testify by the court or any party; and
- (4) may be cross-examined by any party, including the party that called the expert.

(c) Compensation. The expert is entitled to a reasonable compensation, as set by the court. Except as otherwise provided by law, appointment of an expert by the court is subject to the availability of funds or the agreement of the parties concerning compensation.

(d) Disclosing the Appointment to the Jury. The court may authorize disclosure to the jury that the court appointed the expert.

(e) Parties' Choice of Their Own Experts. This rule does not limit a party in calling its own experts.

Comment to 2012 Amendment

The language of subsection (c) of Rule 706 has been amended to provide, consistent with Federal Rule of Evidence 706, that an expert is entitled to a reasonable compensation, as set by the court.

Additionally, the language of subsections (a), (b), (d), and (e) of the rule has been amended to conform to the federal restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent in the restyling to change any result in any ruling on evidence admissibility.

Comment to Original 1977 Rule

Federal Rules of Evidence, Rule 706(b) is appropriate in Federal Courts where the funds to compensate experts are made available by statute. Such funds are not generally available in Arizona except in capital offenses, A.R.S. § 13-673; sanity hearings, A.R.S. § 13-1674; medical liability review panels, A.R.S. § 12-567(B)(4) and (M); and mental health proceedings, A.R.S. § 36-545.04. Therefore, Arizona Rules of Evidence, Rule 706(a) was prefaced by the availability of these funds or the compensation of the experts to be agreed upon, and Federal Rules of Evidence, Rule 706(b) was not adopted, and paragraphs numbered (c) and (d) were renumbered paragraphs (b) and (c) respectively.

Paragraph (a) — Appointment.

706.a.010 The trial court has discretion in determining whether to appoint an expert.

State v. Hansen, 156 Ariz. 291, 751 P.2d 951 (1988) (court refused to adopt rule that defendant is entitled to every psychiatric test possible regardless of possible results, and held trial court did not abuse discretion in refusing to appoint neurologist when doctor testified it was possible, although not highly probable, that defendant suffered from post-concussion syndrome, and that even if defendant did suffer from that syndrome, it was likely she would still be competent to stand trial).

State v. Chaney, 141 Ariz. 295, 686 P.2d 1265 (1984) (because doctors found no evidence of temporal lobe epilepsy, trial court did not abuse discretion in denying request for further examination).

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706.a.020 The United States Constitution may mandate appointment of experts in non-capital cases if the denial of such services would substantially prejudice the defendant.

State v. Peeler, 126 Ariz. 254, 614 P.2d 335 (Ct. App. 1980) (defendant failed to establish that refusal to appoint expert to investigate jury selection system prejudiced him).

706.a.030 Trial court should not appoint an expert unless the expert agrees to act and testify.

State v. Schackart, 175 Ariz. 494, 858 P.2d 639 (1993) (even though defendant told trial court that doctor in question did not accept court appointments, record showed that doctor testified at trial and at sentencing hearing).

706.a.040 To determine whether a treating physician should be considered a fact witness, for which no compensation is due, or an expert witness, for which compensation is due, the trial court should view the party's disclosure stating the capacity in which the physician will testify, with these considerations: (1) questions about the physician's experience and specialization do not mean the physician is being treated as an expert witness because this information is necessary for the jurors to determine the weight to give to that testimony; (2) if the physician testifies based on information acquired independent of the litigation, or testifies about the who, what, when, where, and why relating to the patient or the patient's records, the physician will generally be testifying as a fact witness; (3) if the physician testifies based on reviewing records of other health care providers, or based on medical research or literature, the physician will generally be testifying as an expert witness; (4) if the physician is asked to give an opinion formulated in the course of treating the patient, the physician will generally be testifying as a fact witness; (3) if the physician is asked to give an opinion in general, the physician will generally be testifying as an expert witness; and (5) asking the physician to explain terms or procedures in a manner the trier-of-fact may more easily comprehend does not turn a fact witness into an expert witness.

Sanchez v. Gama, 233 Ariz. 125, 310 P.3d 1, ¶¶ 19–20 (Ct. App. 2013) (court held *Whitten (Martinez)* applies to physicians in civil litigation; court vacated trial court's order that defendant pay plaintiff's physician for all time spent at deposition, and ordered instead defendant would not have to pay physician for testimony relating to care and treatment of plaintiff, but to extent physician's deposition testimony was expert testimony, defendant must compensate physician accordingly).

State ex rel Montgomery v. Whitten (Martinez), 228 Ariz. 17, 262 P.3d 238, ¶¶ 10–21 (Ct. App. 2011) (more than two dozen physicians and health care professionals treated 7-week-old victim for massive brain injury and skull fractures; when victim died, state charged defendant with murder; state disclosed it would call eight of the physicians as witnesses; court entered order that state would have to pay six of them as expert witnesses; court granted relief to state and apparently ordered trial court to base payment on above considerations).

Paragraph (b) — Disclosure of appointment.

No Arizona cases.

Paragraph (c) — Parties' experts of own selection.

No Arizona cases.

April 1, 2020

ARTICLE 8. HEARSAY

Rule 801. Definitions That Apply to This Article; Exclusions from Hearsay.

(a) **Statement.** “Statement” means a person’s oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion.

(b) **Declarant.** “Declarant” means the person who made the statement.

(c) **Hearsay.** “Hearsay” means a statement that:

- (1) the declarant does not make while testifying at the current trial or hearing; and
- (2) a party offers in evidence to prove the truth of the matter asserted in the statement.

(d) **Statements That Are Not Hearsay.** A statement that meets the following conditions is not hearsay:

(1) *A Declarant-Witness’s Prior Statement.* The declarant testifies and is subject to cross-examination about a prior statement, and the statement:

- (A) is inconsistent with the declarant’s testimony;
- (B) is consistent with the declarant’s testimony and is offered:
 - (i) to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or
 - (ii) to rehabilitate the declarant’s credibility as a witness when attacked on another ground; or
- (C) identifies a person as someone the declarant perceived earlier.

(2) *An Opposing Party’s Statement.* The statement is offered against an opposing party and:

- (A) was made by the party in an individual or representative capacity;
- (B) is one the party manifested that it adopted or believed to be true;
- (C) was made by a person whom the party authorized to make a statement on the subject;
- (D) was made by the party’s agent or employee on a matter within the scope of that relationship and while it existed; or
- (E) was made by the party’s coconspirator during and in furtherance of the conspiracy.

The statement must be considered but does not by itself establish the declarant’s authority under (C); the existence or scope of the relationship under (D); or the existence of the conspiracy or participation in it under (E).

Comment to 2015 Amendment to Rule 801(d)(1)(B)

Rule 801(d)(1)(B), as originally adopted, provided for substantive use of certain prior consistent statements of a witness subject to cross-examination. As the federal Advisory Committee on Evidence Rules noted, “[t]he prior statement is consistent with the testimony given on the stand, and, if the opposite party wishes to open the door for its admission in evidence, no sound reason is apparent why it should not be received generally.”

Though the original Rule 801(d)(1)(B) provided for substantive use of certain prior consistent statements, the scope of that rule was limited. The rule covered only those consistent statements that were offered to rebut charges of recent fabrication or improper motive or influence. The rule did not, for example, provide for substantive admissibility of consistent statements that are probative to explain what otherwise appears to be an inconsistency in the witness’s testimony. Nor did it cover consistent statements that would be probative to rebut a charge of faulty memory.

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The amendment retains the requirement set forth in *Tome v. United States*, 513 U.S. 150 (1995): that under Rule 801(d)(1)(B), a consistent statement offered to rebut a charge of recent fabrication or improper influence or motive must have been made before the alleged fabrication or improper inference or motive arose. The intent of the amendment is to extend substantive effect to consistent statements that rebut other attacks on a witness—such as the charges of inconsistency or faulty memory.

The amendment does not change the traditional and well-accepted limits on bringing prior consistent statements before the factfinder for credibility purposes. It does not allow impermissible bolstering of a witness. As before, prior consistent statements under the amendment may be brought before the factfinder only if they properly rehabilitate a witness whose credibility has been attacked. As before, to be admissible for rehabilitation, a prior consistent statement must satisfy the strictures of Rule 403. As before, the trial court has ample discretion to exclude prior consistent statements that are cumulative accounts of an event.

Comment to 2012 Amendment

The last sentence of Rule 801(d)(2) has been added to conform to Federal Rule of Evidence 801(d)(2). The amendment does not, however, include the requirement in Federal Rule of Evidence 801(d)(1)(A) that a prior inconsistent statement be “given under oath” to be considered as non-hearsay.

Otherwise, the language of Rule 801 has been amended to conform to the federal restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent in the restyling to change any result in any ruling on evidence admissibility.

Statements falling under the hearsay exclusion provided by Rule 801(d)(2) are no longer referred to as “admissions” in the title to the subdivision. The term “admissions” is confusing because not all statements covered by the exclusion are admissions in the colloquial sense—a statement can be within the exclusion even if it “admitted” nothing and was not against the party’s interest when made. The term “admissions” also raises confusion in comparison with the Rule 804(b)(3) exception for declarations against interest. No change in application of the exclusion is intended.

Comment to Original 1977 Rule

Evidence which is admissible under the hearsay rules may be inadmissible under some other rule or principle. A notable example is the confrontation clause of the Constitution as applied to criminal cases. The definition of “hearsay” is a utilitarian one. The exceptions to the hearsay rule are based upon considerations of reliability, need, and experience. Like all other rules which favor the admission of evidence, the exceptions to the hearsay rule are counterbalanced by Rules 102 and 403.

Rule 801(d). This subsection of the rule has been modified and is consistent with the United States Supreme Court’s version of the Rule and *State v. Skinner*, 110 Ariz. 135, 515 P.2d 880 (1973).

NOTE: On March 8, 2004, the United States Supreme Court decided *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L. Ed. d. 177 (2004), which greatly changed the law in determining whether admission of certain hearsay statements violated the confrontation clause. Cases decided prior to that date holding that admission of certain statements did not violate the confrontation clause therefore may no longer be good law.

Cases

801.003 The confrontation clause only applies only in a criminal proceeding.

In re Frankovitch, 211 Ariz. 370, 121 P.3d 1240, ¶ 16 (Ct. App. 2005) (jurors found F. to be sexually violent person; F. contended trial court’s admission of his criminal history of arrests and convictions violated right to confrontation; court held that *Crawford* only applies in criminal cases, and because SVP proceeding is civil action, cases decided under confrontation clause did not apply).

HEARSAY

801.004 The confrontation clause does not apply in a probation revocation proceeding.

State v. Carr, 216 Ariz. 444, 167 P.3d 131, ¶¶ 9–10 (Ct. App. 2007) (court rejected claim that admission of urinalysis report at probation revocation proceeding violated right to confrontation).

801.005 In order for an out-of-court statement to be considered “testimonial evidence,” the declarant must have made the statement to an agent of the state.

State v. Hampton, 213 Ariz. 167, 140 P.3d 950, ¶¶ 45–50 & n.12 (2006) (at penalty phase, defendant’s former girlfriend testified about several acts of violence that defendant committed; to extent girlfriend testified about what others had told her, that would not be testimonial evidence because she was not agent of state).

State v. Hill, 236 Ariz. 162, 336 P.3d 1283, ¶¶ 2–25 (Ct. App. 2014) (forensic nurse conducted forensic medical examination of teenage victim, provided medical care, and collected samples of biological evidence; victim died before defendant’s trial from causes unrelated to assault; nurse’s account of victim’s statement was only evidence supporting assault charge; court examined numerous factors and concluded primary purpose of exchange was to provide medical treatment, thus nurse’s testimony was not “testimonial evidence”).

State v. Aguilar, 210 Ariz. 51, 107 P.3d 377, ¶¶ 9–11 (Ct. App. 2005) (in prosecution for murder, state sought to admit testimony by victim’s son of excited utterance made by victim, and testimony by victim’s wife’s brother-in-law of excited utterance made by victim’s wife; court held in-court testimony by lay witness of out-of-court excited utterances that lay witness heard was not “testimonial statement” that must satisfy Sixth Amendment).

State v. Tucker, 231 Ariz. 125, 290 P.3d 1248, ¶ 48 n.15 (Ct. App. 2012) (defendant challenged admission of co-conspirators’ statements; court noted defendant did not explain why out-of-court statements about events prior to involvement in conspiracy should be considered testimonial in nature).

801.006 In order for an out-of-court statement to be considered “testimonial evidence,” the declarant must have made the statement for the purpose of litigation or under circumstances the declarant would reasonably expect to be used prosecutorially.

State v. Medina, 232 Ariz. 391, 306 P.3d 48, ¶¶ 51–64 (2013) (Dr. B. conducted autopsy and prepared autopsy report, but did not testify at trial; Dr. K. was trial witness and testified about report’s conclusions and used report and photographs of body to make various independent conclusions about death; because autopsy was conducted day after killing, which was before defendant became suspect, and report’s purpose was not primarily to accuse specific individual, autopsy report was not testimonial, thus admission of autopsy report did not violate defendant’s right of confrontation; court further held Dr. K.’s testimony did not violate defendant’s right of confrontation).

State v. Parker, 231 Ariz. 391, 296 P.3d 54, ¶¶ 38–41 (2013) (even though bank’s fraud investigator prepared report at request of police, fraud investigator prepared report by copying and pasting victims’ credit card information from bank’s database, thus report contained information bank regularly collected in database, and defendant was able to cross-examine fraud investigator, so report was not testimonial evidence).

State v. Parker, 231 Ariz. 391, 296 P.3d 54, ¶ 42 (2013) (victim prepared time sheets as part of routine business practice and not to aid police investigation, thus time sheets were not testimonial evidence).

State v. Hill, 236 Ariz. 162, 336 P.3d 1283, ¶¶ 2–25 (Ct. App. 2014) (forensic nurse conducted forensic medical examination of teenage victim, provided medical care, and collected samples of biological evidence; victim died before defendant’s trial from causes unrelated to assault; nurse’s account of victim’s statement was only evidence supporting assault charge; court examined numerous factors and concluded primary purpose of exchange was to provide medical treatment, thus nurse’s testimony was not “testimonial evidence”).

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State v. Vasquez, 233 Ariz. 302, 311 P.3d 1115, ¶¶ 10–15 (Ct. App. 2013) (defendant’s brother (codefendant) granted interview to television station to “clear everything out,” and therefore acknowledged testimonial intent and that he would reasonably expect statement to be used prosecutorially; because statement was testimonial, its admission violated defendant’s right of confrontation).

801.007 The confrontation clause does not apply to use of rebuttal evidence offered during penalty phase of capital sentencing.

State v. McGill, 213 Ariz. 147, 140 P.3d 930, ¶¶ 45–52 (2006) (to rebut defendant’s mitigation, state introduced hearsay statements made by victim of defendant’s endangerment conviction and cell mate who said defendant asked him to kill potential witness; court rejected defendant’s contention that admission of these hearsay statements violated confrontation clause).

801.009 If the defendant creates the circumstances that allow for the admissibility of a statement that would otherwise violate the right of confrontation, the defendant on essentially equitable grounds forfeits the protections of the confrontation clause.

Crawford v. Washington, 541 U.S. 36, 62, 124 S. Ct. 1354, 1370 (2004) (“[T]he rule of forfeiture by wrongdoing (which we accept) extinguishes confrontation claims on essentially equitable grounds; it does not purport to be an alternative means of determining reliability.”).

State v. Ellison, 213 Ariz. 116, 140 P.3d 899, ¶¶ 45–47 (2006) (court held that, if defendant introduced those parts of codefendant’s statement implicating codefendant and tending to exculpate defendant, state could inquire on cross-examination about those portions of codefendant’s statement that implicated defendant, and introduction of those other portions would not implicate confrontation clause).

State v. Prasertphong, 210 Ariz. 496, 114 P.3d 828, ¶¶ 24–29 (2005) (defendant sought to introduce portion of codefendant’s statement as statement against penal interest; court held state was then entitled to introduce those remaining portions of codefendant’s statement under Rule 106 that were necessary to keep jurors from being misled, and that by introducing portions of codefendant’s statement, defendant forfeited confrontation clause protection for remaining portions).

801.010 Admission of an out-of-court statement that is non-hearsay is not “testimonial evidence” and does not violate the confrontation clause of the United States Constitution.

Crawford v. Washington, 541 U.S. 36, 59, 124 S. Ct. 1354, 1369 n.9 (2004) (Court stated, “The [Confrontation] Clause also does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted.”).

State v. Forde, 233 Ariz. 543, 315 P.3d 1200, ¶¶ 79–80 (2014) (defendant contended text message from codefendant to defendant that said “cops on scene, lay low” was hearsay; court held message was not admitted to prove truth of matter asserted, but instead to show codefendant was communicating concerns about police activity at victim’s home to someone he thought would share his concerns, and thus was circumstantial evidence of defendant’s involvement; because text message did not seek to establish or prove fact, it was not testimonial).

State v. Womble, 225 Ariz. 91, 235 P.3d 244, ¶¶ 10–13 (2010) (detective testified that jail informant told him about defendant and that he used that information to get court order to listen to telephone calls; because detective testified only about defendant’s existence and not about substance of what informant said, testimony did not violate Confrontation Clause).

State v. Boggs, 218 Ariz. 325, 185 P.3d 111, ¶¶ 29–36 (2008) (detective testified at trial that, during defendant’s interrogation, he asked defendant about statements codefendant had made; defendant contended this violated his Sixth Amendment right of confrontation; court held that, because codefendant’s statements were admitted not to prove truth of matters asserted, but were instead introduced to show context of interrogation, admission did not violate right of confrontation).

HEARSAY

State v. Tucker, 215 Ariz. 298, 160 P.3d 177, ¶¶ 52–62 (2007) (state’s materials expert testified that duct tape used to gag victim was for industrial use, and testified that he based this opinion in part on conversations he had with manufacturer’s sales representatives; because statements from sales representatives were offered to show basis for opinion and not to prove truth of matters asserted, admission of that evidence did not violate confrontation clause).

State v. Smith, 215 Ariz. 221, 159 P.3d 531, ¶¶ 21–26 (2007) (to prove especially heinous, cruel, or depraved aggravating circumstance, state presented testimony of medical examiner, who relied on findings and opinions of medical examiner from 1976; because findings and opinions of previous medical examiner were admitted merely to show basis for testifying medical examiner’s opinion and not to prove truth of matters asserted, admission of that evidence did not violate confrontation clause).

State v. Roque, 213 Ariz. 193, 141 P.3d 368, ¶¶ 69–70 (2006) (in videotape of defendant shown to jurors, detective told defendant his wife made statements incriminating him; because there was no evidence defendant’s wife ever made these statements, detective’s statement was offered to show interrogation technique and not for truth of matter asserted, and trial court instructed jurors this evidence was not offered for its truth; because evidence was not offered to prove truth of matter asserted, it was not hearsay and thus did not violate confrontation clause).

State v. Ellison, 213 Ariz. 116, 140 P.3d 899, ¶¶ 54–56 (2006) (trial court allowed detective to testify that, when codefendant spoke about defendant, his hands shook, his voice broke, and his eyes welled up as if about to cry; defendant contended this was inadmissible hearsay and violated confrontation clause; court stated there was no evidence showing codefendant intended these actions to be assertions, thus they did not violate confrontation clause).

State v. Fosbary, 239 Ariz. 271, 370 P.3d 618, ¶¶ 26–33 (Ct. App. 2016) (testing report prepared by another expert was offered to show basis of expert’s opinion, thus it was not hearsay and did not violate confrontation clause).

State v. Cornman, 237 Ariz. 350, 351 P.3d 357, ¶ 15 (Ct. App. 2015) (defendant contended trial court should have redacted from police station interview detective’s statement that they had “buys” by confidential informant; court held this was admitted for context and not for truth of matter asserted, thus no Confrontation Clause violation).

State v. Hill, 236 Ariz. 162, 336 P.3d 1283, ¶¶ 2–25 (Ct. App. 2014) (forensic nurse conducted forensic medical examination of teenage victim, provided medical care, and collected samples of biological evidence; victim died before defendant’s trial from causes unrelated to assault; nurse’s account of victim’s statement was only evidence supporting assault charge; court examined numerous factors and concluded primary purpose of exchange was to provide medical treatment, thus nurse’s testimony was not “testimonial evidence”).

State v. Fischer, 219 Ariz. 408, 199 P.3d 663, ¶ 37 (Ct. App. 2008) (in prosecution stemming from plural marriage, defendant conceded statements were not “testimonial,” thus admission of out-of-court statements did not violate defendant’s right of confrontation).

State v. Ruggiero, 211 Ariz. 262, 120 P.3d 690, ¶¶ 14–22 (Ct. App. 2005) (defendant was charged with murder from shooting of 13-year-old daughter’s 28-year-old boyfriend; defendant allowed to introduce testimony from ex-girlfriend of one of defendant’s friends (Soto) that Soto had said to her he killed boyfriend; trial court then allowed state to introduce testimony from police officer that Soto had told him defendant had killed boyfriend; court noted second statement was not offered to prove truth of matter asserted and instead was offered only to impeach first statement, thus confrontation clause did not bar use of that statement).

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801.020 For an out-of-court statement considered “testimonial evidence” to be admissible under the confrontation clause, there are two requirements: (1) the declarant must be unavailable, and (2) the defendant must have had a prior opportunity to cross-examine the declarant.

Crawford v. Washington, 541 U.S. 36, 68–69, 124 S. Ct. 1354, 1374 (2004) (Court overruled *Ohio v. Roberts*, 448 U.S. 56 (1980), which had held constitutional right of confrontation did not bar admission of unavailable witness’s statement if statement bore “adequate indicia of reliability,” which meant evidence that either fell within “firmly rooted hearsay exception” or bore “particularized guarantees of trustworthiness”).

State v. Lebr, 227 Ariz. 140, 254 P.3d 379, ¶¶ 27–35 (2011) (before retrial, victim T.H. said she would not testify against defendant because she opposed capital punishment; trial court threatened her with contempt, including jail for up to 6 months; T.H. said putting her in jail or fining her would not change her mind; court held trial court did not abuse discretion in finding T.H. was unavailable and allowing admission of her testimony from first trial).

State v. King, 213 Ariz. 632, 146 P.3d 1274, ¶¶ 2, 17 (Ct. App. 2006) (court held that records of prior convictions and MVD records were not testimonial evidence).

State v. Alvarez, 213 Ariz. 467, 143 P.3d 668, ¶¶ 10, 19–20 (Ct. App. 2006) (court held that, when deputy saw victim staggering and with blood over face and asked victim what happened, victim’s statement in response was not testimonial evidence).

State v. Parks, 213 Ariz. 412, 142 P.3d 720, ¶¶ 1, 6–7 (Ct. App. 2006) (court held officer’s questioning witness after emergency had passed was for purpose of gathering evidence, thus witness’s statement was testimonial evidence and admission of that statement without defendant’s having opportunity to cross-examine violated right of confrontation).

State v. King, 212 Ariz. 372, 132 P.3d 311, ¶¶ 18, 33–35 (Ct. App. 2006) (court held officer’s questioning witness after emergency had passed was for purpose of gathering evidence, thus witness’s statement was testimonial evidence and admission of that statement without defendant’s having opportunity to cross-examine violated right of confrontation).

Bobsancurt v. Eisenberg, 212 Ariz. 182, 129 P.3d 471, ¶¶ 10, 35 (Ct. App. 2006) (court held that intoxilyzer quality assurance records are not testimonial evidence).

State v. Bronson, 204 Ariz. 321, 63 P.3d 1058, ¶¶ 15–28 (Ct. App. 2003) (court held accomplice confessions implicating criminal defendants sought to be admitted under Rule 804(b)(3) are not within firmly-rooted exception; court found insufficient indicia of reliability; court held admission of transcript of accomplice’s interview conducted by defendant’s attorney was error).

State v. Sullivan, 187 Ariz. 599, 931 P.2d 1109 (Ct. App. 1996) (statement of identity of person who caused injuries admissible under Rule 803(4)).

801.025 Whether a witness is considered “unavailable” for Sixth Amendment purposes is determined as a matter of constitutional law, and not as a matter of state evidentiary law.

State v. Real, 214 Ariz. 232, 150 P.3d 805, ¶ 11 (Ct. App. 2007) (officer administered FSTs to defendant and then took his statement; at trial, officer had no independent memory of investigation, so trial court allowed officer to read from his report; defendant contended officer was “unavailable” under Rule 804(a)(3); court held that, because officer was present and was subject to cross-examination, officer was available).

801.030 When a witness testifies and is subject to cross-examination, any statement that witness made is admissible and its admission does not violate the confrontation clause.

HEARSAY

Crawford v. Washington, 541 U.S. 36, 59, 124 S. Ct. 1354, 1369 n.9 (2004) (Court stated, “[W]hen the declarant appears for cross-examination at trial, the confrontation clause places no constraints at all on the use of his prior testimonial statements.”).

State v. Anderson, 210 Ariz. 327, 111 P.3d 369, ¶¶ 31–32 (2005) (because declarant did testify, there was no valid *Bruton* objection to use of her statements).

State v. Joe, 234 Ariz. 26, 316 P.3d 615, ¶ 13 n.3 (Ct. App. 2014) (because victim testified and was subject to cross-examination, admission of her prior statement to detective did not violate confrontation clause).

State v. Lopez, 217 Ariz. 433, 175 P.3d 682, ¶ 17 (Ct. App. 2008) (nurse testified about victim’s description of attacker’s physical contact with her, and about answers victim gave to questions included in sexual assault kit provided by TPD; because victim testified and was subject to cross-examination, there was no confrontation clause issue).

State v. Salazar, 216 Ariz. 316, 166 P.3d 107, ¶¶ 3–8 (Ct. App. 2007) (when victim testified she did not remember or could not recall, prosecutor played her tape recorded statement; because victim was present and subject to cross-examination; admission of her out-of-court statement did not violate confrontation clause).

State v. Real, 214 Ariz. 232, 150 P.3d 805, ¶¶ 2–9 (Ct. App. 2007) (officer administered FSTs to defendant and then took his statement; at trial, officer had no independent memory of investigation, so trial court allowed officer to read from his report; court held, because officer testified and was subject to cross-examination, admission of officer’s testimony did not violate Sixth Amendment).

801.040 Statements made during police interrogation under circumstances objectively indicating the primary purpose of the interrogation was to enable police assistance to meet an ongoing emergency are not testimonial.

State v. Boggs, 218 Ariz. 325, 185 P.3d 111, ¶¶ 55–58 (2008) (officers arrived and spoke to victim, who was outside restaurant and had been shot twice; at trial, officers testified about victim’s statements; court held victim’s statements described what appeared to be ongoing emergency, thus they were non-testimonial).

State v. Hill, 236 Ariz. 162, 336 P.3d 1283, ¶¶ 2–25 (Ct. App. 2014) (forensic nurse conducted forensic medical examination of teenage victim, provided medical care, and collected samples of biological evidence; victim died before defendant’s trial from causes unrelated to assault; nurse’s account of victim’s statement was only evidence supporting assault charge; court examined numerous factors and concluded primary purpose of exchange was to provide medical treatment, thus nurse’s testimony was not “testimonial evidence”).

State v. Alvarez, 213 Ariz. 467, 143 P.3d 668, ¶¶ 12, 18–19 (Ct. App. 2006) (officer found victim with bloody face and hair; officer asked victim what happened, and victim said three men had jumped him and had taken his car; victim died before trial; court held that, although victim gave answers in response to officer’s question, primary purpose of question was to enable police assistance to meet an ongoing emergency and not to establish or prove past events for later criminal prosecution, thus victim’s statement was not testimonial and admission did not violate confrontation clause).

State v. King, 212 Ariz. 372, 132 P.3d 311, ¶¶ 2–6, 29–32 (Ct. App. 2006) (declarant called 9-1-1 and requested officers come to her house, said she had restraining order against defendant, who had just thrown two puppies over her house; operator asked where defendant was, declarant said he “just drove off” and she did not know where he was; in response to further questions, declarant identified defendant by name, date of birth, clothing, and race, and provided model and color of vehicle; court reversed conviction and stated that, on remand, trial court should consider which portions of 9-1-1 might be admissible and which parts might not be admissible).

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801.050 Statements made during police interrogation under circumstances objectively indicating there is no ongoing emergency, and that the primary purpose is to establish or prove past events potentially relevant to later criminal prosecution are testimonial.

State v. Parks, 213 Ariz. 412, 142 P.3d 720, ¶¶ 4–7 (Ct. App. 2006) (police arrived after victim had been killed; after determining that defendant’s son and brother had witnessed shooting, police separated and questioned them; because conduct showed police were operating in investigative mode, statements were testimonial, thus admission violated confrontation clause).

State v. King, 212 Ariz. 372, 132 P.3d 311, ¶¶ 2–6, 29–32 (Ct. App. 2006) (declarant called 9-1-1 and requested that officers come to her house, said she had restraining order against defendant, who had just thrown two puppies over her house; when operator asked where defendant was, declarant said he “just drove off” and that she did not know where he was; in response to further questions, declarant identified defendant by name, date of birth, clothing, and race, and provided model and color of vehicle; court reversed conviction and stated that, on remand, trial court should consider which portions of 9-1-1 might be admissible and which parts might not be admissible).

801.060 If the out-of-court statement is the functional equivalent of in-court testimony or was made under circumstances that the declarant would reasonably expect to be available at trial against a particular defendant, it will be considered a “testimonial statement” or “testimonial evidence” and thus will not be admissible unless (1) the declarant is unavailable, and (2) the defendant has had a prior opportunity to cross-examine the declarant.

State v. Parks, 211 Ariz. 19, 116 P.3d 631, ¶¶ 36–53 (Ct. App. 2005) (defendant’s son witnessed actions that led to death of victim; officers arrived and one officer interviewed son, who was emotional at time; son died before trial; court held that son’s statement qualified as excited utterance; court further held son’s statement was “testimonial statement” because: (1) officer already knew defendant had killed victim when he interviewed son; (2) defendant had already been arrested; (3) there were no exigent safety, security, or medical concerns; (4) officer’s questioning was not casual encounter; (5) officer separated son and other witness before questioning them; (6) officer was operating in investigative mode; (7) purpose of questioning was to obtain information about potential crime; and (8) son appeared to appreciate that what he had witnessed would have significance to future criminal prosecution; court held admission of son’s statement violated defendant’s confrontation clause rights), *aff’d*, 213 Ariz. 412, 142 P.3d 720, ¶ 8 (Ct. App. 2006).

801.070 If the out-of-court statement is not the functional equivalent of in-court testimony or was not made under circumstances that the declarant would reasonably expect to be available at trial against a particular defendant, it will not be considered a “testimonial statement” or “testimonial evidence” and thus its admissibility will be controlled by the rules governing hearsay statements.

State v. Shivers, 230 Ariz. 91, 280 P.3d 635, ¶¶ 11–15 (Ct. App. 2012) (defendant charged with interfering with judicial process; defendant contended admission of written declaration of service of order of protection without testimony of officer who served it on him violated his Sixth Amendment rights; court concluded written declaration was non-testimonial because officer created it primarily for administrative purposes rather than prosecutorial purposes; mere possibility document might later be used in future prosecution did not render it testimonial).

State v. Damper, 223 Ariz. 572, 225 P.3d 1148, ¶¶ 7–13 (Ct. App. 2010) (throughout morning, defendant and girlfriend (C.) argued because C. did not want defendant to go to MLK Day event because she worried defendant’s ex-girlfriend might be there and because she feared violence might break out at event; at 11:21 a.m., C’s friend B. received text message from C’s cell phone that said, “Can you come over; me and Marcus [defendant] are fighting and I have no gas”; shortly after that, defendant’s roommate heard gunshot; defendant told roommate C. had been shot; at trial, defendant claimed shooting was accidental; at trial, trial court admitted text message; on appeal, defendant contended

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admission of text message violated his Sixth Amendment right of confrontation; because defendant did not object at trial, court reviewed for fundamental error only; because nothing indicated C. intended text message might later be used in prosecution or at trial, court concluded text message was not testimonial, thus no Sixth Amendment violation).

State v. Alvarez, 213 Ariz. 467, 143 P.3d 668, ¶¶ 16–17 (Ct. App. 2006) (officer found victim staggering down road with blood in hair and on face; officer asked victim what happened, and victim said three men had jumped him and had taken car; victim died before trial; court held, although victim gave answers in response to officer's question, there was nothing to suggest victim would have reasonably expected his statement to be used in a later criminal prosecution, thus statement was not testimonial and admission did not violate confrontation clause).

Bobsancurt v. Eisenberg, 212 Ariz. 182, 129 P.3d 471, ¶¶ 12–18, 31 (Ct. App. 2006) (because applicable regulations required that each Intoxilyzer 5000 undergo calibration checks every 31 days whether or not machine is used, and because person doing calibration and maintenance test on particular machine has no idea whether affidavit of results of those tests will ever be used against particular defendant, court held that affidavit of Crime Laboratory employee who conducted calibration and maintenance test on Intoxilyzer 5000 was not “testimonial evidence,” thus admission of affidavit did not violate confrontation clause).

Bobsancurt v. Eisenberg, 212 Ariz. 182, 129 P.3d 471, ¶¶ 32–34 (Ct. App. 2006) (because affidavit contained no testimony against any particular person, mere fact that item in question was an affidavit does not make it “testimonial evidence”).

State v. Aguilar, 210 Ariz. 51, 107 P.3d 377, ¶¶ 2–13 (Ct. App. 2005) (in prosecution for murder, state sought to admit testimony by victim's son of excited utterance made by victim, and testimony by victim's wife's brother-in-law of excited utterance made by victim's wife; court held in-court testimony by lay witness of out-of-court excited utterances that lay witness heard was not “testimonial statement” that must satisfy Sixth Amendment).

State v. Alvarez, 210 Ariz. 24, 107 P.3d 350, ¶¶ 18–22 (Ct. App. 2005) (officer found victim staggering down road with blood in hair and on face; officer asked victim what happened, and victim said three men had jumped him and had taken his car; victim died before trial; court held, although victim gave answers in response to officer's questions, this was not “police interrogation”: victim did not call police, instead officer had found him; officer did not know crime had been committed, and instead questioned him about injuries in order to obtain medical help for him; questioning was neither structured nor conducted for purpose of producing evidence in anticipation of potential criminal prosecution, thus was not “testimonial statement”), *vac'd*, 213 Ariz. 467, 143 P.3d 668, ¶ 2 (Ct. App. 2006).

801.080 Whether the declarant would reasonably expect the statement to be available at trial against a particular defendant **is** a crucial element in determining whether the statement is “testimonial evidence.”

State v. King, 212 Ariz. 372, 132 P.3d 311, ¶ 21 (Ct. App. 2006) (“a primary factor in determining if a hearsay statement is testimonial is whether ‘a reasonable person in the position of the declarant would objectively foresee that his statement might be used in the investigation or prosecution of a crime’”).

State v. Parks, 211 Ariz. 19, 116 P.3d 631, ¶ 36 (Ct. App. 2005) (“a statement may be testimonial under *Crawford* if the declarant would reasonably expect it to be used prosecutorially or if it was made under circumstances that would lead an objective witness reasonably to believe the statement would be available for use at a later trial”), *aff'd*, 213 Ariz. 412, 142 P.3d 720, ¶ 8 (Ct. App. 2006).

801.090 Whether the declarant would reasonably expect the statement to be available at trial against a particular defendant **is not** a crucial element in determining whether the statement is “testimonial evidence.”

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State v. King, 213 Ariz. 632, 146 P.3d 1274, ¶¶ 15–27 (Ct. App. 2006) (court held that records of prior convictions were public record, and that retention and production of such records was not type of evil that confrontation clause intended to avoid, thus records were not “testimonial evidence”).

State v. Alvarez, 213 Ariz. 467, 143 P.3d 668, ¶ 15 (Ct. App. 2006) (court noted that, in *Davis v. Washington*, Court apparently shifted focus from motivation or reasonable expectations of declarant to primary purpose of interrogation).

Bobsancurt v. Eisenberg, 212 Ariz. 182, 129 P.3d 471, ¶¶ 28–31 (Ct. App. 2006) (court acknowledged that person doing calibration and maintenance test on Intoxilyzer 5000 and preparing affidavit of results would know that affidavit may be used in court, but noted that United States Supreme Court did not specifically emphasize any of its stated formulations as determinative of whether statement was “testimonial evidence,” and thus concluded that knowledge of person preparing affidavit did not make affidavit “testimonial evidence”).

801.100 The Confrontation Clause does not require that every person in the chain of custody be available to cross-examination, thus not everyone whose testimony might be relevant in establishing the chain of custody, authenticity of the sample, or accuracy of the testing device must appear in person.

State v. Gomez, 226 Ariz. 165, 244 P.3d 1163, ¶¶ 1–21 (2010) (DNA testing and analysis involved seven steps; during first six steps, technicians used machines to isolate and amplify DNA and generate profiles, but did not interpret data or draw conclusions, and those technicians did not testify; senior forensic analyst who was laboratory supervisor testified in detail about laboratory’s operating procedures, standards, and safeguards, and although she did not witness all steps, she checked technicians’ records for any deviations from laboratory’s protocols, and then personally performed final step in process, interpretation and comparison, which was only step that required human analysis; that analyst then testified that several profiles derived from evidence at crime scene matched profile obtained from defendant’s blood sample; court separated testimony into two parts: (1) testimony about laboratory protocols and generation of DNA profiles and (2) expert opinion that profiles matched; court assumed without deciding (1) machine-generated DNA profiles were hearsay statements and (2) although profiles were not admitted in evidence, senior analyst’s testimony was functional equivalent of introduction of profiles in evidence; court held chain of custody testimony did not violate Confrontation Clause simply because every technician who handled and processed samples did not testify, and that because defendant had opportunity to cross-examine senior analyst and question her about laboratory’s procedures, technicians work, and machine-generated data, admission of senior analyst’s testimony did not violate Confrontation Clause).

State v. Ortiz, 238 Ariz. 329, 360 P.3d 125, ¶¶ 22–59 (Ct. App. 2015) (both parties agreed that defendant’s claim was “exactly the same” as that in *State v. Gomez*, 226 Ariz. 165, 244 P.3d 1163 (2010); court rejected defendant’s contention that *Gomez* was no longer good law in light of recent United States Supreme Court opinions).

Bobsancurt v. Eisenberg, 212 Ariz. 182, 129 P.3d 471, ¶¶ 10, 35 (Ct. App. 2006) (court held that intoxilyzer quality assurance records are not testimonial evidence).

801.110 The Confrontation Clause does not apply to statements made by co-conspirators.

State v. Tucker, 231 Ariz. 125, 290 P.3d 1248, ¶ 49 (Ct. App. 2012) (defendant challenged admission of statements made by co-conspirators; court noted there is no requirement that co-conspirator’s statement satisfy the Confrontation Clause to be admissible).

801.200 A statement admitted in violation of the confrontation clause may be harmless error.

State v. Armstrong, 218 Ariz. 451, 189 P.3d 378, ¶¶ 31–34 (2008) (witness testified extensively at guilt phase of trial, but after remand for retrial of sentencing phase (before different jury), witness refused to testify, so trial court allowed state to present to jurors transcript of witness’s testimony from guilt

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phase; court did not have to address whether admission of transcript was error because only way transcript could have affected verdict was in determination whether defendant committed multiple murders, and there was other evidence to establish that defendant committed multiple murders, so any error would have been harmless).

State v. Smith, 215 Ariz. 221, 159 P.3d 531, ¶¶ 32–33 (2007) (because detective’s report was admissible as recorded recollection, and because statements of medical examiner contained in report were admissible as present sense impressions, report satisfied hearsay requirements; because jurors heard other evidence about manner in which victims died and wounds they suffered, even if admission of detective’s report was error, any error was harmless).

Paragraph (a) — Statement.

801.a.005 In order to be considered a “statement,” the words must contain an assertion; thus if the words do not contain an assertion, they are not considered to be a “statement,” and by definition are not hearsay.

State v. Fischer, 219 Ariz. 408, 199 P.3d 663, ¶ 31 (Ct. App. 2008) (in prosecution from plural marriage, witness was merely giving his observations about FLDS Church and what he saw occur; because he was not testifying about out-of-court declarations by third persons, his testimony was not hearsay).

801.a.010 If verbal or nonverbal conduct is not intended to be an assertion, by definition it is not hearsay, even if it is offered as evidence of the declarant’s implicit belief of a fact.

State v. Steinle (Moran), 239 Ariz. 415, 372 P.3d 939, ¶¶ 21–22 (2016) (state intended to use 31-second cell-phone video recording of fight; defendant contended video contained multiple levels of hearsay, including conduct and people making statements heard on video; court noted conduct on video was not intended as an assertion, thus video was not hearsay).

State v. Ellison, 213 Ariz. 116, 140 P.3d 899, ¶¶ 54–56 (2006) (trial court allowed detective to testify that, when codefendant spoke about defendant, his hands shook, his voice broke, and his eyes welled up as if about to cry; defendant contended this was inadmissible hearsay and violated confrontation clause; court stated there was no evidence showing codefendant intended these actions to be assertions, thus they were not hearsay).

State v. Palmer, 229 Ariz. 64, 270 P.3d 891, ¶¶ 4–10 (Ct. App. 2012) (hospital employee (B.C.) testified she found methamphetamine in backpack that had been transferred from ambulance that had brought defendant to hospital; on cross-examination, B.C. acknowledged backpack had not been inventoried along with defendant’s other belongings and had been removed by two women who had come into defendant’s trauma bay after B.C. found the methamphetamine; on re-direct, B.C. testified women asked defendant where is your backpack; defendant contended B.C.’s testimony about what women asked was hearsay; court held statement women made was not intended as assertion and thus was not hearsay, even though women acted as they did because of their belief in existence of condition sought to be proved, i.e., that backpack belonged to defendant).

State v. Chavez, 225 Ariz. 442, 239 P.3d 761, ¶¶ 6–10 (Ct. App. 2010) (in inventory search of defendant’s vehicle, officers found drugs and two cell phones; on cell phones were text messages in which unidentified senders apparently sought to buy drugs from defendant; defendant contended these messages were hearsay; court held these messages were not offered to prove truth of matters asserted (that senders wanted to purchase drugs), and they were not assertions that defendant had drugs for sale; rather they were offered as circumstantial evidence that defendant had drugs for sale, and fact that they showed declarants thought defendant had drugs for sale did not make them assertions).

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Paragraph (c) — Hearsay.

801.c.010 Hearsay is an oral, written, or non-verbal assertion, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

State v. Tucker, 215 Ariz. 298, 160 P.3d 177, ¶¶ 45–50 (2007) (defendant contended written descriptions on some photographs in montage of 44 photographs showing corpses and autopsies were hearsay statements; because photographs and statements were not offered to prove truth of matters asserted, statements were not hearsay).

State v. Tucker, 215 Ariz. 298, 160 P.3d 177, ¶¶ 52–60 (2007) (state’s materials expert testified duct tape used to gag victim was for industrial use, and testified he based this opinion in part on conversations he had with manufacturer’s sales representatives; because statements from sales representatives were offered to show basis for opinion and not to prove truth of matters asserted, they were not hearsay).

State v. Smith, 215 Ariz. 221, 159 P.3d 531, ¶¶ 21–26 (2007) (to prove especially heinous, cruel, or depraved aggravating circumstance, state presented testimony of medical examiner, who relied on findings and opinions of medical examiner from 1976; because findings and opinions of previous medical examiner were admitted merely to show basis for testifying medical examiner’s opinion and not to prove truth of matters asserted, statements were not hearsay).

State v. Pandeli, 200 Ariz. 365, 26 P.3d 1136, ¶ 19 (2001) (because defendant wanted to introduce confession to exculpate himself and thus for truth of matter asserted, confession was hearsay and not admissible unless it came under some exception).

State v. Dickens, 187 Ariz. 1, 926 P.2d 468 (1996) (detective’s testimony he was unable to obtain any information from two different people was not hearsay because it did not relate any out-of-court statement, and because it was offered to show steps the detective had taken to investigate case and rebut defendant’s claim that police were making him take the fall for someone else).

State v. Foshay, 239 Ariz. 271, 370 P.3d 618, ¶¶ 26–33 (Ct. App. 2016) (testing report prepared by another expert was offered to show basis of expert’s opinion and not for truth of matter asserted, thus it was not hearsay and did not violate confrontation clause).

State v. Damper, 223 Ariz. 572, 225 P.3d 1148, ¶¶ 14–15 (Ct. App. 2010) (trial court admitted text message from victim’s cell phone that said, “Can you come over; me and Marcus [defendant] are fighting and I have no gas”; because this was out-of-court statement offered to prove truth of matter asserted (victim and defendant were fighting), statement was hearsay).

State v. May, 210 Ariz. 452, 112 P.3d 39, ¶¶ 11–14 (Ct. App. 2005) (defendant charged with DUI with person under 15 in vehicle; officer testified that man had arrived at scene and said that he was defendant’s brother and that person in vehicle was his 13-year-old son; court held that man’s statement was offered to prove truth of matter asserted, and thus was hearsay).

Fuentes v. Fuentes, 209 Ariz. 51, 97 P.3d 876, ¶¶ 24–25 (Ct. App. 2004) (wife submitted copy of budget she prepared for trial; because this budget was out-of-court statement offered to prove truth of matters asserted, it was hearsay, even though wife discussed budget while testifying; court concluded admission of exhibit did not prejudice husband because (1) wife testified and was subject to cross-examination, (2) information in exhibit was similar to affidavit of financial information that was admitted at trial, (3) admission of this type of evidence is fairly routine in dissolution proceedings, and (4) this was bench trial and court assumed trial court considered only competent evidence).

State v. Davis, 205 Ariz. 174, 68 P.3d 127, ¶ 29 (Ct. App. 2003) (in attempt to show someone else might have killed victim, defendant wanted to offer as exculpatory evidence witness’s testimony that victim had told her she was pregnant with M.H.’s child; court held this was hearsay because it was offered for truth of matter asserted, and that is was not admissible as state of mind under Rule 803(3) or statement for medical purpose under Rule 803(4)).

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Ogden v. J.M. Steel Erecting, Inc., 201 Ariz. 32, 31 P.3d 806, ¶¶ 36–37, 40 (Ct. App. 2001) (to prove driving record of driver who caused accident, plaintiffs presented driver’s MVD record (listing three prior offenses) and police report of investigating officer, which contained supplement by another officer purporting to show driver’s alleged driving record (listing 10 additional prior offenses); because plaintiffs offered supplement to prove driving record, supplement was hearsay; plaintiff cited only Rule 803(24) for admission of supplement).

Higgins v. Higgins, 194 Ariz. 266, 981 P.2d 134, ¶¶ 27–29 (Ct. App. 1999) (father’s testimony of what his mother told him the children told her was double hearsay, and because neither level came under some hearsay exception, trial court should not have admitted testimony).

State v. Hernandez, 191 Ariz. 553, 959 P.2d 810, ¶ 8 (Ct. App. 1998) (20 minutes after killing victim, defendant called 9-1-1 and told operator that victim had attacked him with two broken bottles and so he shot victim in self-defense; court rejected defendant’s claim that statement was not hearsay because he was offering it to rebut premeditation, and held it was offered to prove truth of matter asserted—that defendant acted in self-defense).

State v. Tinajero, 188 Ariz. 350, 935 P.2d 928 (Ct. App. 1997) (because what translator told officer was statement made out of court and offered to prove truth of matter asserted, it was hearsay; court held it was admissible under catch-all exception). (Note: this probably could have been admissible under Rule 803(1), present sense impressions.)

State v. Geotis, 187 Ariz. 521, 930 P.2d 1324 (Ct. App. 1996) (officer testified he found cash, club, water pistol, and pager inside defendant’s car; defendant claimed, because state did not offer item in evidence, testimony was hearsay; court found defendant’s argument “frivolous”).

State v. Dunlap, 187 Ariz. 441, 930 P.2d 518 (Ct. App. 1996) (because statement was offered to prove truth of matter asserted (Boles was investigating Marley) it was hearsay).

801.c.020 If the evidence is an out-of-court assertion, it is not hearsay if it is offered for a purpose other than to prove the truth of the matter asserted, but that other purpose still must be relevant.

State v. Forde, 233 Ariz. 543, 315 P.3d 1200, ¶¶ 77–78 (2014) (defendant contended text message from codefendant to defendant that said “cops on scene, lay low” was hearsay; court held message was not admitted to prove truth of matter asserted, but instead to show codefendant was communicating concerns about police activity at victim’s home to someone he thought would share his concerns, and thus was circumstantial evidence of defendant’s involvement).

State v. Dickens, 187 Ariz. 1, 926 P.2d 468 (1996) (detective’s testimony that he was unable to obtain any information from two different people was not hearsay because it did not relate any out-of-court statement, and because it was offered to show steps the detective had taken to investigate case and rebut defendant’s claim that police were making him take the fall for someone else).

State v. Cornman, 237 Ariz. 350, 351 P.3d 357, ¶ 15 (Ct. App. 2015) (defendant contended trial court should have redacted from police station interview detective’s statement that they had “buys” by confidential informant; court held this was admitted for context and not for truth of matter asserted, thus no Confrontation Clause violation).

State v. Fischer, 219 Ariz. 408, 199 P.3d 663, ¶ 35 (Ct. App. 2008) (in prosecution stemming from plural marriage, testimony about how church had taken action against witness by removing him from church was for purpose of determining whether witness had any bias against church and “prophet,” and thus was not hearsay).

Crackel v. Allstate Ins. Co., 208 Ariz. 252, 92 P.3d 882, ¶¶ 59–64 (Ct. App. 2004) (trial court ordered parties to participate in settlement conference before Judge O’Neil; based on their conduct, Judge O’Neil found Allstate’s employees had not participated in settlement conference in good faith, and ordered case to be tried on issue of damages only, at which point Allstate settled plaintiffs’ claims;

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plaintiffs then sued Allstate for abuse of process, and sought to introduce Judge O’Neil’s order sanctioning Allstate; court held sanction order was not hearsay because it was not offered to prove truth of matters asserted, but was instead offered to show effect it had on Allstate and its employees in settling plaintiffs’ claims, and that this evidence was relevant on issue of punitive damages).

State v. Supinger, 190 Ariz. 326, 947 P.2d 900 (Ct. App. 1997) (officer’s testimony that victim’s mother said victim had been telling lies, had been sexually abused as a child, and had not been given sufficient counseling were not offered to prove truth of matters asserted, but were offered to support state’s position that victim’s recantation was false).

State v. Rivers, 190 Ariz. 56, 945 P.2d 367 (Ct. App. 1997) (testimony of parole officer that he called defendant’s home and was told defendant was not there was admitted not to prove defendant was not home, but instead to explain why parole officer took steps he did).

State v. Dunlap, 187 Ariz. 441, 930 P.2d 518 (Ct. App. 1996) (because statement was not offered to prove truth of matter asserted (Boles was investigating Funk family) but was instead offered to show inadequacy of police investigation, it was not hearsay).

State v. McCoy, 187 Ariz. 223, 928 P.2d 647 (Ct. App. 1996) (because notes, letters, photographs, and “roll call,” all with gang logos and insignia on them, not offered to prove truth of matters asserted in them, but to show knowledge and participation of possessor, they were not hearsay, and identity of their author was not relevant).

801.c.025 If the out-of-court statement is offered simply for the purpose of proving that the statement was made, then it is not an assertion and it is not hearsay.

State v. Fischer, 219 Ariz. 408, 199 P.3d 663, ¶ 33 (Ct. App. 2008) (in prosecution from plural marriage, statement that “prophet” told witness that “the Lord wants to bless you with another lady” was not offered to prove truth of matter asserted and thus was not hearsay).

Penn-American Ins. v. Sanchez, 220 Ariz. 7, 202 P.3d 472, ¶¶ 36–39 & n.9 (Ct. App. 2008) (Inside Arizona (IA) arranged for C., independent owner-operator, to deliver goods to Tucson; on return trip, C. was involved in accident that killed three people; Statutory Beneficiaries sued IA, who had \$1,000,000 commercial general liability policy with Penn-American and \$1,000,000 automobile insurance policy with NAICC; Penn-American at first defended without reservation of rights, and then 10 months into litigation, tendered defense to NAICC and issued reservation of rights letter to IA; IA later entered into *Morris* agreement with Statutory Beneficiaries wherein it stipulated to \$4.3 million judgment and assigned to Statutory Beneficiaries any claims it might have against Penn-American; on motions for summary judgment, issue was whether 10 months was unreasonable delay and whether delay prejudiced IA; Statutory Beneficiaries contended IA was prejudiced because NAICC refused to commit to coverage; Penn-American contended Statutory Beneficiaries failed to produce any admissible evidence that NAICC had actually refused to commit to coverage; Statutory Beneficiaries relied on three letters authored by NAICC’s counsel that they claimed were “evidence [of] NAICC’s refusal to commit to coverage as a result of Penn-American’s untimely reservation of rights,” two of which described NAICC’s concerns that it may be prejudiced by the “late notice situation”; Penn-American contended letters contained inadmissible hearsay; court held that letters were not offered to prove truth of matters asserted and were instead “verbal acts” and as such were properly before the trial court and constituted evidence of NAICC’s position on coverage).

801.c.027 A statement made as a command is not hearsay if it is not intended as an assertion.

State v. Fischer, 219 Ariz. 408, 199 P.3d 663, ¶ 34 (Ct. App. 2008) (in prosecution stemming from plural marriage, statement that “prophet” “read some scriptures relative to multiply and replenish the earth” was command, not statement of fact, and thus was not hearsay).

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801.c.030 If the out-of-court assertion is admitted for a purpose other than to prove the truth of the matter asserted, then its admission does not violate the right of confrontation.

State v. Boggs, 218 Ariz. 325, 185 P.3d 111, ¶¶ 29–36 (2008) (detective testified at trial that, during defendant’s interrogation, he asked defendant about statements codefendant had made; defendant contended this violated his Sixth Amendment right of confrontation; court held that, because codefendant’s statements were admitted not to prove truth of matters asserted, but were instead introduced to show context of interrogation, admission did not violate right of confrontation).

State v. Rogovich, 188 Ariz. 38, 932 P.2d 794 (1997) (because the out-of-court facts or data upon which expert relied were offered only to show basis for expert’s opinion and not as substantive evidence, admission of this evidence did not violate defendant’s right of confrontation).

State v. Fosby, 239 Ariz. 271, 370 P.3d 618, ¶¶ 26–33 (Ct. App. 2016) (testing report prepared by another expert was offered to show basis of expert’s opinion and not for truth of matter asserted, thus it was not hearsay and did not violate confrontation clause).

State v. Cornman, 237 Ariz. 350, 351 P.3d 357, ¶ 15 (Ct. App. 2015) (defendant contended trial court should have redacted from police station interview detective’s statement that they had “buys” by confidential informant; court held this was admitted for context and not for truth of matter asserted, thus no Confrontation Clause violation).

State v. Larson, 222 Ariz. 341, 214 P.3d 429, ¶¶ 20–22 (Ct. App. 2009) (trial court admitted in evidence recorded portions of defendant’s interrogation by police in which detective asserted defendant was guilty; defendant contended detective’s statement was hearsay and should not have been admitted; court held that, because those portions were admitted to provide context for defendant’s response and not to prove truth of matters asserted, detective’s statements were not hearsay).

801.c.035 If an expert witness discloses the facts or data only for the limited purpose of disclosing the basis of the opinion, they are not substantive evidence and admission of those facts and data does not violate the right of confrontation, and because they are not admitted to prove the truth of the matter asserted, they are not hearsay.

State v. Pandeli, 242 Ariz. 175, 394 P.3d 2, ¶¶ 46–51 (2017) (Dr. B. performed autopsy, and Dr. K. testified he formed his own opinion of cause of death based on autopsy report and photographic exhibits; autopsy report not admitted in evidence; court noted it “has held that an autopsy report is nontestimonial when created to determine the manner and cause of death to aid in apprehending a suspect at large, rather than gathering evidence for prosecution of a known suspect”).

State v. Gondeau, 239 Ariz. 421, 372 P.3d 945, ¶¶ 147–49 (2016) (defendant contended trial court erred by allowing expert to testify that, as part of “second chair process,” another unidentified PPD firearms examiner “agreed with his identification”; court held expert did not act as mere “conduit” for other examiner’s opinion, and it was instead part of verification process PPD crime laboratory generally followed in this type of case).

State v. Guarino, 238 Ariz. 437, 362 P.3d 484, ¶¶ 33–35 (2015) (state’s gang experts were permitted to base opinions on information from debriefings, free talks, wire taps, and letter interceptions from gang members, and learned in undercover capacity from gang members).

State v. Joseph, 230 Ariz. 296, 283 P.3d 27, ¶¶ 7–13 (2012) (to prepare for testimony, medical examiner reviewed autopsy report prepared by doctor who did not testify; because (1) autopsy report was not admitted in evidence, (2) medical examiner used facts only as basis of his opinion, and (3) medical examiner formed his own opinion, allowing medical examiner to testify based on that autopsy report did not violate defendant’s right of confrontation).

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State v. Dixon, 226 Ariz. 545, 250 P.3d 1174, ¶¶ 33–37 (2011) (Dr. H.K. conducted autopsy in 1978; at trial held 11/13/07, Dr. P.K. testified based on his review of autopsy report and photographs, neither of which were admitted in evidence; court rejected defendant’s contention that Dr. P.K.’s testimony violated his right of confrontation).

State v. Gomez, 226 Ariz. 165, 244 P.3d 1163, ¶¶ 22–24 (2010) (senior forensic analyst who was laboratory supervisor testified in detail about laboratory’s operating procedures, standards, and safeguards, and although she did not witness all steps in process, she checked technicians’ records for any deviations from laboratory’s protocols, and then personally performed final step in process, interpretation and comparison, which was only step that required human analysis; court held senior analyst’s testimony did not violate Confrontation Clause).

State v. Snelling, 225 Ariz. 182, 236 P.3d 409, ¶¶ 18–20 (2010) (victim was killed in 1996, but police did not identify defendant as suspect until 2003; defendant contended medical examiner’s testimony in 2007 violated his right of confrontation because she had not performed victim’s autopsy in 1996 nor authored autopsy report; medical examiner testified she formed her own opinion and that 1996 autopsy report was only part of basis for her opinion; court held medical examiner’s testimony was not hearsay and did not violate defendant’s right of confrontation).

State v. Tucker, 215 Ariz. 298, 160 P.3d 177, ¶¶ 45–50 (2007) (defendant claimed written descriptions on some photographs in montage of 44 photographs were hearsay statements; because photographs and statements were not offered to prove truth of matters asserted, statements were not hearsay).

State v. Smith, 215 Ariz. 221, 159 P.3d 531, ¶¶ 21–23, 26 (2007) (to prove especially heinous, cruel, or depraved aggravating circumstance, state presented testimony of medical examiner, who relied on findings and opinions of medical examiner from 1976; because this was type of information upon which experts in this area reasonable rely, trial court did not err in permitting expert to testify about those findings and opinions, and this testimony did not violate Confrontation Clause).

State v. Smith, 242 Ariz. 98, 393 P.3d 159, ¶¶ 6–13 (Ct. App. 2017) (technician K.L. conducted saliva tests on victim’s underwear and submitted test results to analyst B.S., who testified at trial basing testimony in part on K.L.’s test results; because B.S. testified at trial, but had not done any independent analysis of test results, her testimony was hearsay and violated defendant’s right of confrontation).

State v. Foshay, 239 Ariz. 271, 370 P.3d 618, ¶¶ 26–33 (Ct. App. 2016) (testing report prepared by another expert was offered to show basis of expert’s opinion and not for truth of matter asserted, thus it was not hearsay and did not violate confrontation clause).

State ex rel. Montgomery v. Karp (Voris), 236 Ariz. 120, 336 P.3d 753, ¶¶ 2–19 (Ct. App. 2014) (criminalist L.K. analyzed defendant’s blood sample using gas chromatograph; by time of trial, L.K. had moved out of state and left profession; court held criminalist J.V. could give her opinion of defendant’s BAC based on L.K.’s examination notes and reports, chromatogram from blood sample L.K. analyzed, printouts from quality control samples, and summary of quality assurance for blood-alcohol sequence that L.K. had performed on defendant’s blood sample).

State v. Pesqueira, 235 Ariz. 470, 333 P.3d 797, ¶¶ 15–19 (Ct. App. 2014) (in forming opinion about cause of death, state’s medical expert based opinion in part on autopsy report generated in Mexico; court held, because autopsy report was not offered to establish some fact, it was not testimonial and thus testimony about autopsy report did not violate Confrontation Clause).

Paragraph (d)(1)(A)—Statements that are not hearsay: Prior inconsistent statement by witness.

801.d.1.A.010 A prior statement is admissible if it is inconsistent with trial testimony, based on the rationale that the jurors should be allowed to hear the conflicting statements and determine which story represents the truth in light of all the facts, such as the demeanor of the witness, the matters brought out in direct and cross-examination, and the testimony of others.

HEARSAY

State v. West, 238 Ariz. 482, 362 P.3d 1049, ¶¶ 72–74 (Ct. App. 2015) (prosecutor questioned defendant’s expert witness about book chapter he had co-authored; court rejected defendant’s contention that prosecutor had to establish book was reliable under Rule 803(18), and held information was admissible as prior inconsistent statement under Rule 801(d)(1)(A)).

State v. Ortega, 220 Ariz. 320, 206 P.3d 769, ¶¶ 30–34 (Ct. App. 2008) (victim’s brother saw defendant molest victim; when called to testify, brother either did not remember his prior statements to police detective or denied making them; trial court properly allowed state to read to brother excerpts from his interview with police, whereupon he remembered telling detective that defendant threatened him if he told anyone what had happened).

State v. Mills, 196 Ariz. 269, 995 P.2d 705, ¶¶ 17–20 (Ct. App. 1999) (trial court allowed state to impeach witness with videotape of testimony from preliminary hearing).

State v. Miller, 187 Ariz. 254, 257, 928 P.2d 678, 681 (Ct. App. 1996) (trial court allowed admission of prior statements of co-defendant and two others who were there at the time).

801.d.1.A.020 The degree of contradiction determines whether a statement is inconsistent, but an inconsistent statement is not limited to one diametrically opposed to trial testimony.

State v. Payne, 233 Ariz. 484, 314 P.3d 1239, ¶¶ 46–50 (2013) (defendant sought to introduce codefendant’s threats to “kill” children if defendant did not control their behavior; court held this was prior inconsistent statement, but trial court did not abuse discretion in precluding it under Rule 403).

State v. Rutledge (Sherman), 205 Ariz. 7, 66 P.3d 50, ¶¶ 14–25 (2003) (witness admitted making videotaped prior statement to police, acknowledged inconsistencies between trial testimony and videotape, and offered explanations for those inconsistencies; defendant contended prior statements therefore were not inconsistent with trial testimony, and contended trial court abused discretion in admitting extrinsic evidence of prior statement (videotape); court noted there were several inconsistencies between trial testimony and the videotaped interview, and that witness testified he had lied to police because he was scared, had been threatened, and was intoxicated, and thus held videotape was admissible to allow jurors to assess witness’s demeanor and credibility, and helped them decide which of witness’s accounts to believe).

801.d.1.A.030 Failure of a witness to address a subject or state a fact in a prior statement under circumstances in which the witness naturally would have addressed that subject or stated that fact may be an inconsistency and may be subject for impeachment.

State v. Rutledge (Sherman), 205 Ariz. 7, 66 P.3d 50, ¶¶ 14–25 (2003) (witness admitted making videotaped prior statement to police, acknowledged inconsistencies between trial testimony and videotape, and offered explanations for those inconsistencies; defendant claimed prior statements were not inconsistent with trial testimony, and contended trial court abused discretion in admitting extrinsic evidence of prior statement (videotape); court noted there were inconsistencies between trial testimony and videotaped interview, and because witness claimed he lied to police because he was scared, had been threatened, and was intoxicated, videotape was admissible to allow jurors to assess witness’s demeanor and credibility, and helped them decide which of witness’s accounts to believe).

801.d.1.A.035 Inconsistencies between trial testimony and prior statement go to the weight of the trial testimony, not its admissibility.

State v. Rivera, 210 Ariz. 188, 109 P.3d 83, ¶ 20 (2005) (plea agreements required witnesses to testify truthfully; defendant contended witnesses did not understand terms of plea agreements; court noted witnesses’ statements indicated they understood they had to testify truthfully, and inconsistencies between trial testimony and prior statements went to weight of testimony, not admissibility).

State v. Ortega, 220 Ariz. 320, 206 P.3d 769, ¶¶ 30–33 (Ct. App. 2008) (victim’s brother saw defendant molest victim; when called to testify, brother either did not remember his prior statements to detec-

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tive or denied making them; trial court properly allowed state to read to brother excerpts from his interview with police, whereupon he remembered telling detective defendant threatened him if he told anyone what had happened; court stated to extent defendant was contending brother's testimony was unreliable because it was inconsistent, that was issue of credibility for jurors to resolve).

801.d.1.A.070 If the witness cannot remember making a prior statement, the prior statement is admissible if the trial court determines the witness is feigning loss of memory, or if the trial court is not able to determine whether the witness is feigning loss of memory and record suggests reasons for witness to be evasive; if the loss of memory is genuine, the prior statement is not inconsistent and therefore is not admissible under this rule.

State v. Hausner, 230 Ariz. 60, 280 P.3d 604, ¶¶ 55–61 (2012) (trial court did not find and record did not suggest person making statement feigned lack of memory, and because person was one of shooting victims, person would have no apparent reason to do so, thus trial court erred in concluding statement was prior inconsistent statement, but in light of other evidence, any error in admission of statement was harmless).

State v. King, 180 Ariz. 268, 275, 883 P.2d 1024, 1031 (1994) (once trial court concluded witness was feigning lack of memory, it allowed detective to testify about witness's prior statements).

State v. Robinson, 165 Ariz. 51, 58–59, 796 P.2d 853, 860–61 (1990) (witness told officers he saw Washington, Robinson, and Mathers together, and Washington was wearing bandana; at trial, he testified he could not recall whether it was Mathers and Robinson he saw together or Mathers and Washington, and did not recall who was wearing bandana; trial court allowed officer to testify about witness's prior statements; trial court stated it did not know whether witness was being evasive or was merely typical of many people with poor recollection; court held trial court did not abuse discretion in permitting state to impeach witness with prior statement).

State v. Joe, 234 Ariz. 26, 316 P.3d 615, ¶¶ 13–16 (Ct. App. 2014) (although victim said she could not remember assault, upon further questioning, it appeared victim simply did not want to talk about it, thus her statement that she “would rather not say” was inconsistent with statement to detective, making statement to detective admissible as prior inconsistent statement).

State v. Salazar, 216 Ariz. 316, 166 P.3d 107, ¶¶ 13–15 (Ct. App. 2007) (victim testified she did not remember or could not recall; prosecutor played her taped statement; court stated trial court has considerable discretion in determining whether witness's evasive answers of lack of recollection may be considered inconsistent with witness's prior out-of-court statements, and that trial court did not abuse discretion in determining witness was feigning inability to recall).

State v. Nevarez, 178 Ariz. 525, 875 P.2d 184 (Ct. App. 1993) (trial court concluded victim's loss of memory was feigned, thus no error in allowing impeachment with prior inconsistent statement).

State v. Anaya, 165 Ariz. 535, 799 P.2d 876 (Ct. App. 1990) (witness denied any recall of events in question; trial court specifically found that witness was being deceitful).

State v. Salazar, 146 Ariz. 547, 707 P.2d 951 (Ct. App. 1985) (wife was passenger in car accident, but could not remember anything about accident, including who was driving; court held that, if she was lying about not remembering, prior statement was admissible under Rule 801(d)(1), and if she was being truthful about not remembering, prior statement was admissible under Rule 804(b)(5)).

State v. Hutchinson, 141 Ariz. 583, 688 P.2d 209 (Ct. App. 1984) (witness could not remember from where she got paper towel; error to admit police officer's testimony that witness told him she got towel from defendant's office).

State v. Just, 138 Ariz. 534, 675 P.2d 1353 (Ct. App. 1983) (because witness's loss of memory was genuine, witness was “unavailable” under Rule 804(a)(3), and statements would be admissible only if they came under an exception in Rule 804(b)).

HEARSAY

801.d.1.A.090 In determining under Rule 403 whether to admit a prior inconsistent statement, the trial court should consider, *inter alia* the following *Allred* factors: (1) whether the witness being impeached admits or denies making impeaching statement and whether the witness being impeached is subject to any factors affecting reliability, such as age or mental capacity; (2) whether the witness presenting the impeaching statement has an interest in the proceedings and whether there is any other evidence showing the witness made the impeaching statement; (3) whether the witness presenting impeaching statement is subject to any other factors affecting reliability, such as age or mental capacity; (4) whether the true purpose of the statement is to impeach witness or to serve as substantive evidence; and (5) whether there is any evidence of guilt other than the statement.

State v. Hernandez, 232 Ariz. 313, 305 P.3d 378, ¶¶ 45–49 (2013) (prosecutor asked witness whether she remembered telling detective that defendant said, “[Victim #1] and [victim #2] weren’t going to be bothering Sonia anymore,” and witness said she did not remember making that statement; in rebuttal, detective testified witness did make that statement to him; court analyzed five *Allred* factors and concluded only (4) weighed against admission of impeaching testimony, while other four factors favored admissibility, thus trial court did not abuse discretion in admitting impeaching statement).

State v. Williams, 236 Ariz. 600, 343 P.3d 470, ¶¶ 14–19 (Ct. App. 2015) (because state presented no other evidence to prove defendant’s use of marijuana other than evidence admitted for impeachment purposes only that defendant had THC in blood, trial court vacated defendant’s conviction for use of marijuana).

State v. Sucharen, 205 Ariz. 16, 66 P.3d 59, ¶¶ 19–23 (Ct. App. 2003) (state alleged defendant and D. were racing when defendant’s vehicle hit and killed victim; state granted D. immunity to obtain his testimony; D. testified he did not know how fast he was going and he never drove side-by-side with defendant’s car; but later admitted telling officer he was going 60 m.p.h.; officer then testified, over defendant’s objection, that D. told him he was going 80 m.p.h. and was “kind of” racing defendant; court stated only fourth factor (substantive use rather than impeachment) militated against admission of prior inconsistent statement, and because there was other evidence of defendant’s guilt, held trial court did not abuse discretion in admitting evidence of prior inconsistent statement).

State v. Miller, 187 Ariz. 254, 928 P.2d 678 (Ct. App. 1996) (for five *Allred* factors, (1) three witnesses denied making statements, (2) impeaching witnesses had no interest in proceedings and three statements corroborated each other, (3) there were no factors affecting reliability of impeaching witnesses, (4) true purpose of admission was to establish guilt, and (5) impeaching statements were only evidence of guilt; even though three of five factors were in favor of exclusion, because statements corroborated each other, court concluded trial court did not err in admitting them).

801.d.1.A.100 A police officer is not “interested” merely because of involvement in the criminal investigation, and is “interested” only if the officer has some personal connection with the participants or personal stake in the outcome of the case.

State v. Sucharen, 205 Ariz. 16, 66 P.3d 59, ¶ 22 (Ct. App. 2003) (court rejected defendant’s claim that officer testifying had interest in proceedings by citing *State v. Miller* and not discussing issue further).

State v. Miller, 187 Ariz. 254, 928 P.2d 678 (Ct. App. 1996) (there was no showing that any of the three officers who took prior statements had any personal interest in case).

801.d.1.A.110 A prior inconsistent statement may be considered as substantive evidence as well as used for impeachment purposes.

State v. Huerstel, 206 Ariz. 93, 75 P.3d 698, ¶ 42 n.9 (2003) (defendant’s witnesses testified that codefendant told them he shot all three victims; trial court allowed state to introduce codefendant’s statement in which he claimed defendant shot all three victims; court held admission of codefendant’s statement violated confrontation clause, thus trial court erred in admitting it; court noted that use of

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prior inconsistent statement as substantive evidence is predicated on fact that witness who made statement testifies and thus is subject to cross-examination, but when prior inconsistent statement is admitted under Rule 806, declarant has not testified at trial and thus is not subject to cross-examination, so only way statement could be used is for impeachment and not as substantive evidence).

State v. Acree, 121 Ariz. 94, 97, 588 P.2d 836, 839 (1978) (victim told police that defendant pointed gun at her and had tried to shoot her; at trial, victim testified that defendant never pointed gun at her, that she did not believe defendant would have harmed her, and that she could have blown entire matter out of proportion; state was then allowed to impeach victim's trial testimony with statement she made during police interview; defendant contended trial court erred in allowing use of prior inconsistent statements for substantive purposes; court held evidence was admissible for substantive purposes).

State v. Mills, 196 Ariz. 269, 995 P.2d 705, ¶ 21 (Ct. App. 1999) (trial court allowed state to impeach witness with videotape of testimony from preliminary hearing; court rejected defendant's claim that statement should not have been admitted because jurors might have used it as substantive evidence).

801.d.1.A.120 The trial court is not required to instruct the jurors that a prior inconsistent statement may be considered as substantive evidence if the trial court instructs the jurors that they are to determine the facts and assess the credibility of the witnesses.

State v. Nordstrom, 200 Ariz. 229, 25 P.3d 717, ¶ 83 (2001) (trial court did not abuse discretion in refusing to instruct jurors they could consider prior inconsistent statement both for impeachment and as substantive evidence).

Paragraph (d)(1)(B)—Statements that are not hearsay: Prior consistent statement by witness.

801.d.1.B.010 A prior consistent statement is admissible to rebut an express or implied charge of recent fabrication or improper influence or motive.

State v. Jones, 197 Ariz. 290, 4 P.3d 345, ¶¶ 13–18 (2000) (defendant implied that two witnesses had motives to fabricate because state gave them plea bargains, and third witness had motive to fabricate because he, rather than defendant, was responsible for killings).

State v. Granados, 235 Ariz. 321, 332 P.3d 68, ¶¶ 32–34 (Ct. App. 2014) (prosecutor asked officer how victim appeared and behaved during interview, method of interview, and general intake process; on cross-examination, defendant's attorney asked officer about specific statement victim had made; court held prosecutor properly asked on rebuttal about victim's other statements that clarified previous answers and rebutted inference of recent fabrication).

State v. Trani, 200 Ariz. 383, 26 P.3d 1154, ¶¶ 3, 13 (Ct. App. 2001) (on cross-examination, defendant's attorney asked witness about several violations of her plea agreement, implying that witness had fabricated testimony to retain benefits of plea agreement; state properly permitted to read consistent statement witness made before entering into plea agreement).

Sheppard v. Crow-Baker-Paul No. 1, 192 Ariz. 539, 968 P.2d 612, ¶ 34 (Ct. App. 1998) (because defendant in cross-examining plaintiff and in final argument sought to persuade jurors that plaintiff was misrepresenting how injury occurred, statement was admissible as prior consistent statement).

801.d.1.B.030 Cross-examination can trigger the use of a prior consistent statement.

State v. Trani, 200 Ariz. 383, 26 P.3d 1154, ¶¶ 3, 13 (Ct. App. 2001) (on cross-examination, defendant's attorney asked witness about several violations of her plea agreement, implying that witness had fabricated testimony to retain benefits of plea agreement; state properly permitted to read consistent statement witness made before entering into plea agreement).

HEARSAY

801.d.1.B.040 To be admissible, a prior consistent statement must have been made prior to the time the motive to fabricate arose or the improper influence was applied.

State v. Hoskins, 199 Ariz. 127, 14 P.3d 977, ¶¶ 65–67 (2001) (detective testified about statements witness made about defendant’s wanting to commit car-jacking and kill victim; although defendant had claimed witness was biased and had motive to fabricate, court concluded that bias and motive arose prior to time witness made statements, but held that, even if testimony was improperly admitted, any error was harmless because witness testified and told jurors same things that detective told them).

State v. Jones, 197 Ariz. 290, 4 P.3d 345, ¶¶ 13–18 (2000) (defendant implied that two witnesses had motives to fabricate because state gave them plea bargains; because those witnesses made statements prior to time state offered plea bargains, prior statements were admissible; defendant implied third witness had motive to fabricate because he, rather than defendant, was responsible for killings; because motive to fabricate would have arisen at time of killing, statement was made after motive arose, thus trial court erred in admitting prior statement, but any error was harmless).

Sheppard v. Crow-Baker-Paul No. 1, 192 Ariz. 539, 968 P.2d 612, ¶ 35 (Ct. App. 1998) (because defendant did not raise claim at trial that prior consistent statement was not made prior to time motive to fabricate arose, defendant waived this claim on appeal).

State v. Tinajero, 188 Ariz. 350, 935 P.2d 928 (Ct. App. 1997) (because trial court could have concluded that defendant’s motive to fabricate arose once he was arrested, trial court properly excluded prior consistent statement defendant made after being arrested).

State v. Jones, 188 Ariz. 534, 937 P.2d 1182 (Ct. App. 1996) (because victim made statements prior to being placed in juvenile detention, which defendant claimed gave her motive to fabricate, trial court properly admitted statements consistent with victim’s trial testimony).

Paragraph (d)(1)(C)—Statements that are not hearsay: Statement of identification.

801.d.1.C.010 A declarant-witness’s prior statement is not hearsay if (1) declarant testifies and is subject to cross-examination about a prior statement and (2) the statement identifies a person as someone the declarant perceived earlier.

State v. Rojo-Valenzuela, 235 Ariz. 617, 334 P.3d 1276, ¶ 17 (Ct. App. 2014) (as officer got out of vehicle, shots struck vehicle; officer chased suspect, who climbed over wall; officer did not see shooter’s face, but did take note of shooter’s build and clothing; other officers located several suspects and conducted series of show-ups; testimony by officer who conducted show-up about what first officer said when identifying suspect was not hearsay), *aff’d*, 237 Ariz. 448, 352 P.3d 917 (2015).

Paragraph (d)(2)(A) —Statements that are not hearsay: Party-opponent’s own admission.

801.d.2.A.005 A party’s statement is admissible.

State v. Escalante-Orozco, 241 Ariz. 254, 386 P.3d 798, ¶¶ 70–71 (2017) (victim’s boyfriend was not available at time of trial; defendant sought to admit testimony from detective that boyfriend had said he and victim had fought several days before victim was killed and that boyfriend had said he had been “bad” to his wife; court held statements were not admissible under this rule because boyfriend was not a party).

State v. Cruz, 218 Ariz. 149, 181 P.3d 196, ¶¶ 5, 50–51 (2008) (officers were chasing defendant; when officer saw defendant and drew his gun, defendant said, “Just do it. . . Just go ahead and kill me now. Kill me now. Just get it over with”; court held defendant’s statement qualified as party admission and thus was admissible).

Picaso v. Tucson Unif. S.D., 217 Ariz. 178, 171 P.3d 1219, ¶ 7 (2007) (plaintiff’s guilty plea in criminal case was admissible in civil case).

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- * *State v. Griffith*, 247 Ariz. 361, 449 P.3d 353, ¶ 14 (Ct. App. 2019) (defendant contended social medial communications were hearsay; because record contained evidence from which jurors could reasonably conclude that message was authored by defendant himself, trial court did not abuse discretion in admitting that evidence).

State v. Bucceri-Bianca, 233 Ariz. 324, 312 P.3d 123, ¶¶ 31–33 (Ct. App. 2013) (while defendant was in jail, social worker said to him, “You’re innocent until proven guilty,” to which defendant stated, “I’m guilty”; court held defendant’s declaration was admissible as statement by party opponent).

Cal X-tra v. W.V.S.V. Holdings, 229 Ariz. 377, 276 P.3d 11, ¶¶ 55–57 (Ct. App. 2012) (with plaintiffs’ motion for summary judgment, plaintiffs included deposition from one plaintiff [Beus] stating what Sara Taylor Hickey [Taylor] told him about source of computer disk that had on it damaging information; because Taylor was married to a defendant [Hickey] at time of her statement to Beus and was a defendant in litigation, her statement was admissible as statement of party opponent).

801.d.2.A.010 A party’s statement does not have to be against the party’s interest, thus any statement of a party is admissible as long as it is relevant.

State v. Nordstrom, 200 Ariz. 229, 25 P.3d 717, ¶¶ 50, 55 (2001) (because defendant’s letter and statement to third person were defendant’s own statements, they were not hearsay).

State v. Bocharski, 200 Ariz. 50, 22 P.3d 43, ¶¶ 37–39 (2001) (while in jail, defendant allegedly assaulted fellow inmate; trial court admitted by stipulation inmate’s statement of what defendant said during assault; court noted this was statement of a party, thus not hearsay, but held statement, “If it were up to me, you would be dead right now,” had no relevance, thus it was error to admit statement, but any error was harmless in light of other evidence).

801.d.2.A.025 A party’s factual allegations in a civil complaint are evidentiary admissions and may be introduced against the party.

Henry v. Healthpartners of Southern Ariz., 203 Ariz. 393, 55 P.3d 87, ¶¶ 6–9 (Ct. App. 2002) (medical malpractice action resulting from patient’s death from cancer was filed against decedent’s doctor, radiologist employed by medical center, and medical center (TMC/HSA); plaintiff settled with doctors and went to trial against TMC/HSA; TMC/HSA named doctors as non-parties at fault; plaintiff’s trial strategy was to minimize radiologist’s fault in order to place more of blame on TMC/HSA; court held plaintiff’s factual allegations contained in complaint delineating radiologist’s negligence were relevant and admissible against plaintiff).

801.d.2.A.045 Because a statement under this rule is an admission by a party opponent, there is no requirement that it be independently corroborated.

State v. Garza, 216 Ariz. 56, 163 P.3d 1006, ¶ 41 (2007) (in telephone call from jail, when asked why he was arrested, defendant stated, “Well, remember what you wanted me to do when that one guy beat you up, well I did it to someone else”; court rejected defendant’s contention that statement’s trustworthiness had to be independently corroborated).

801.d.2.A.050 To be admissible, the statement must be offered against a party, thus a criminal defendant’s prior exculpatory statement, offered by the defendant and not by the party-opponent, is hearsay and not admissible.

State v. Smith, 138 Ariz. 79, 84, 673 P.2d 17, 22 (1983) (defendant’s exculpatory statement to police officer was hearsay).

State v. Wooten, 193 Ariz. 357, 972 P.2d 993, ¶¶ 46–47 (Ct. App. 1998) (trial court properly precluded defendant from offering own statement denying responsibility for killing).

HEARSAY

801.d.2.A.060 The *corpus delicti* doctrine ensures a defendant's conviction is not based upon an uncorroborated confession or incriminating statement, thus state must show (1) a certain result has been produced, and (2) the result was caused by criminal action rather than by accident or some other non-criminal action; only a reasonable inference of the *corpus delicti* need exist before the jurors may consider the statement, and circumstantial evidence may support such an inference; furthermore, the state need not present evidence supporting the inference of *corpus delicti* before it submits the defendant's statement as long as the state ultimately submits adequate proof of the corpus delicti before it rests.

State v. Carlson, 237 Ariz. 381, 351 P.3d 1079, ¶¶ 8–14 (2015) (defendant gave television interview wherein he admitted kidnapping (and killing) two victims; blood and DNA evidence linked to victim #1 was found in back seat and trunk of defendant's car; her purse was found in her trailer, and testimony indicated she would have taken purse if she left voluntarily; court held this supported inference that defendant kidnapped victim #1; DNA evidence linked to victim #2 was found in passenger compartment of defendant's car, and victim #1 and victim #2 lived together and disappeared at same time, and remains of both victims were disposed of in same manner and found in same place; court held this supported inference that defendant kidnapped victim #2).

State v. Chappell, 225 Ariz. 229, 236 P.3d 1176, ¶¶ 8–10 (2010) (2-year-old victim died by drowning in swimming pool; defendant did not object at trial to admission of his statements, but claimed on appeal his statements about murder should have been excluded because state failed to prove *corpus delicti*; because defendant did not object to admission of his statements at trial, court reviewed for fundamental error only; court held following evidence corroborated defendant's statements: Several days before victim's death, defendant was seen inspecting swimming pool area at apartment complex where victim and his mother lived; rock similar to rocks found near defendant's parents' house was used to prop open pool gate; mother routinely locked apartment door at night, making it unlikely victim could have opened door himself; at one time, defendant had key to mother's apartment; and victim's body was found in pre-dawn hours in pool located some distance from mother's apartment; court held this corroborating evidence made it very unlikely victim's death was accident; court found no error, fundamental or otherwise).

State v. Morris, 215 Ariz. 324, 160 P.3d 203, ¶¶ 33–35 (2007) (defendant contended state presented insufficient evidence of *corpus delicti* for deaths of victims; court held following evidence established *corpus delicti*: bodies were found naked in alley; drag marks indicated they had been moved to alley; DNA on clothing in defendant's camper matched DNA of bodies; one body had defendant's DNA under her fingernails; hair extensions found in defendant's camper were similar to hair extensions of one body; and defendant possessed identification cards from one body when arrested).

State v. Hall, 204 Ariz. 442, 65 P.3d 90, ¶¶ 43–47 (2003) (at close of state's case, defendant moved for judgment of acquittal, arguing state failed to establish *corpus delicti* of crimes charged; court held that, even though state never found body of victim, state presented circumstantial evidence that victim met with foul play and that others were using victim's property, which was sufficient for jurors to conclude victim was dead and that death resulted from criminal conduct).

State v. Scott, 177 Ariz. 131, 142–43, 865 P.2d 792, 803–04 (1993) (stated that, before uncorroborated confession is admissible as evidence of crime, state must establish *corpus delicti* by proving (1) certain result has been produced and (2) that someone is criminally responsible for that result, but only reasonable inference of *corpus delicti* need exist before confession may be considered, but held *corpus delicti* doctrine did not apply at sentencing stage).

State v. Atwood, 171 Ariz. 576, 598, 832 P.2d 593, 615 (1992) (court held pre-offense statements do not require corroboration because they do not contain inherent weaknesses of admissions made after fact; court noted, however, circumstances of child's disappearance, expert testimony about paint and nickel transfers between defendant's car and victim's bicycle, and testimony placing defendant in neighborhood and with a young child provided *corpus delicti* for kidnapping).

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State v. Atwood, 171 Ariz. 576, 598–99, 832 P.2d 593, 615–16 (1992) (defendant contended state failed to establish *corpus delicti* for murder and thus his murder conviction was invalid; court held evidence that 8-year-old girl disappeared from neighborhood and was found dead in desert several miles from home, that defendant was a known pedophile and was within yards of girl seconds before she vanished, that defendant was with young girl in his car, and that he later had blood on his hands and his clothing and cactus needles in his arms and legs provided *corpus delicti* for murder, thus jurors properly could consider defendant's admissions).

State v. Gillies, 135 Ariz. 500, 505–06, 662 P.2d 1007, 1012–13 (1983) (at close of stat's case, defendant made motion for judgment of acquittal on ground state failed to present sufficient evidence to establish *corpus delicti* of sexual assault; court held evidence established *corpus delicti*: victim was found not wearing panties, panties were discovered in area where victim was allegedly raped, and girlfriend testified that victim normally wore panties; victim's shoe was pushed inside leg of pantyhose in manner suggestive of violence; medical examiner discovered seminal fluid in victim's vagina; and foreign pubic hairs were found in victim's pubic area; trial court did not err in denying defendant's motion for judgment of acquittal).

State v. Gerlaugh, 134 Ariz. 164, 169–70, 654 P.2d 800, 805–06 (1982) (defendant contended trial court erred in denying motion for judgment of acquittal based on claim that state did not establish *corpus delicti* for either kidnapping and armed robbery; court held following evidence established *corpus delicti*: defendant and codefendant both confessed and each indicated kidnapping, armed robbery, and murder had taken place; mutilated body of victim was found in field far from his home and car; condition of body was consistent with activities described in confessions; court noted corroboration points to veracity of confessions, which is purpose of *corpus delicti* requirement).

State v. Maciel, 238 Ariz. 200, 358 P.3d 621, ¶¶ 27–30 (Ct. App. 2015) (defendant was seated next to vacant building with broken window; when officer arrived, defendant denied any knowledge of removal of board from window; defendant later said he had removed board day before and entered building to look for money; court noted following: (1) person from building next door told officers board had been in place over window 3 days earlier; (2) force needed to have been used to remove board; (3) shoe prints were inside building, and although they did not match shoes defendant was wearing, defendant could have been wearing different shoes day before; (4) building was used primarily for storage and window led to storage area; and (5) maintenance man who walked property twice weekly had not reported seeing anything “out of place” before incident; court held this was sufficient circumstantial evidence to show burglary had been committed and corroborated defendant's statements), *vac'd on other grounds*, 240 Ariz. 46, 375 P.3d 938 (2016).

State v. Gill, 234 Ariz. 186, 319 P.3d 248, ¶¶ 2–9 (Ct. App. 2014) (officers investigated collision; when officers spoke with defendant, they noted he slurred his speech, swayed while standing, staggered while walking, and emanated strong odor of intoxicants; defendant admitted drinking and driving truck, and told officers he thought he had hit curb; court held following evidence was sufficient to establish *corpus delicti*: in early morning hours, law enforcement officers responded to report of vehicular collision in residential neighborhood caused by “a possible drunk driver”; officers discovered pickup truck had collided with parked boat, causing over \$5,000 damages to boat; no one was in or around truck when officers responded to scene, but they learned defendant lived several houses away; officers went to defendant's residence and found him awake and in process of showering; his girlfriend testified defendant had been out that night; she had heard him come home and then had heard the police knocking at door about 5 minutes later; she testified truck belonged to defendant's deceased friend and defendant sometimes kept it at his house when he “needed to use it for work or something”; she removed Gill's tools and property from truck before it was towed away).

HEARSAY

State v. Sarullo, 219 Ariz. 431, 199 P.3d 686, ¶¶ 6–10 (Ct. App. 2008) (defendant was victim’s ex-boyfriend; victim kept gun unloaded on closet shelf; on 8/25, victim awoke at night and saw defendant standing in her bedroom; defendant walked over to victim, pointed gun at her, and threatened her; after defendant put down gun and left, victim saw it was her gun and it was loaded; after being arrested, defendant told police he had entered victim’s home 8/24 and took gun; defendant contended there was no *corpus delicti* for burglary and theft for entering and taking gun on 8/24; court stated that, although there was no evidence, apart from defendant’s confession, of 8/24 burglary and theft, there was uncontradicted evidence of 8/25 burglary and aggravated assault, thus there was independent evidence of “closely related” crimes; moreover, defendant had told victim that he had entered her home 8/24 and had taken her gun, and gun was unloaded when taken and loaded when recovered; court concluded defendant’s confession was sufficiently corroborated and that evidence supported reasonable inference he committed 8/24 offenses).

State v. Barragan-Sierra, 219 Ariz. 276, 196 P.3d 879, ¶¶ 11–15 (Ct. App. 2008) (defendant was convicted of conspiracy to commit human smuggling; court held following evidence supported reasonable inference that defendant committed offense: (1) when officers tried to stop truck, it sped off reaching speeds of 100+ mph; (2) once truck stopped, driver and three other persons fled into nearby cornfield and were not found; (3) defendant was found with four other persons hiding under piece of carpet in bed of truck; (4) defendant appeared tired and his clothes were soiled; and (5) federal documents showed defendant was not in country legally).

State v. Morgan, 204 Ariz. 166, 61 P.3d 460, ¶¶ 17–23 (Ct. App. 2002) (defendant was charged with sexual conduct with minor based on oral sexual conduct, child molestation for touching victim’s genitals with his hand, and one count of sexual assault for engaging in sexual intercourse with victim without her consent; defendant confessed that he engaged in oral sexual contact with victim; neither victim nor any other witness testified about any oral sexual contact; defendant contended there was no *corpus delicti* for sexual conduct counts; although there was no independent evidence of oral sexual contact, following evidence was presented about other offenses: victim testified that defendant touched her between legs and had forceful sexual intercourse with her, and witness saw defendant and victim in back seat of car, both naked from waist down, and with victim straddling defendant; court held that, even though there was no independent evidence of oral sexual contact, there was evidence to support the other charged offenses, which were closely related, and this supported a reasonable inference the oral sexual conduct had occurred).

State v. Morgan, 204 Ariz. 166, 61 P.3d 460, ¶ 24 (Ct. App. 2002) (defendant was charged with sexual conduct with minor based on oral sexual conduct, child molestation for touching victim’s genitals with his hand, and sexual assault for engaging in sexual intercourse with victim without her consent; defendant contended there was no *corpus delicti* for child molestation; court noted victim testified defendant touched her between legs, which was sufficient independent evidence of child molestation).

State ex rel. McDougall v. Superior Ct. (Plummer), 188 Ariz. 147, 933 P.2d 1215 (Ct. App. 1996) (evidence showed vehicle was being driven improperly and occupants in it were intoxicated, and husband said wife was driving; this established *corpus delicti* for charge against wife).

801.d.2.A.061 Whether the state has produced sufficient evidence to establish *corpus delicti* apart from the defendant’s statement is a legal analysis for the trial court, thus if the state fails to produce sufficient evidence to establish *corpus delicti* apart from the defendant’s statement, the trial court should grant a motion for judgment of acquittal, but if the trial court determines the state has produced sufficient evidence to establish *corpus delicti*, the jurors may consider all the evidence and there is no need to instruct the jurors on corroboration.

State v. Cornman, 237 Ariz. 350, 351 P.3d 357, ¶¶ 16–20 (Ct. App. 2015) (because trial court determined state had established *corpus delicti*, trial court did not abuse discretion in denying defendant’s requested jury instruction on corroboration).

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State v. Nieves, 207 Ariz. 438, 87 P.3d 851, ¶¶ 6–26 (Ct. App. 2004) (defendant said she placed her hand over mouth of 10-month-old daughter until she stopped breathing; court concluded body of victim and unexplained death were not sufficient to establish *corpus delicti* of crime).

State v. Flores, 202 Ariz. 221, 42 P.3d 1186, ¶¶ 4–19 (Ct. App. 2002) (defendant was found with two small rocks of crack cocaine, and when questioned, told officers he was holding drugs for third person, who would tell him to whom to deliver the drugs; state charged defendant with possession for sale; because only evidence of sale was defendant’s statement, there was no *corpus delicti* for crime of possession for sale, trial court properly suppressed defendant’s statement).

801.d.2.A.062 Because the purpose of a preliminary hearing is to determine whether probable cause exists that the person charged committed the offense, the doctrine of *corpus delicti* does not apply at a preliminary hearing

State v. Jones (Roche), 198 Ariz. 18, 6 P.3d 323, ¶¶ 7, 15–18 (Ct. App. 2000) (trial court applied *corpus delicti* rule, excluded defendant’s statement, held there otherwise was not sufficient evidence to show probable cause, and granted motion for new determination of probable cause; court held trial court erred in concluding that *corpus delicti* rule applied at preliminary hearing).

801.d.2.A.063 Because the *corpus delicti* rule applies only to extra-judicial statements, it does not apply to a defendant’s in-court statement establishing the factual basis for a guilty plea.

State v. Rubiano, 214 Ariz. 184, 150 P.3d 271, ¶¶ 1, 10 (Ct. App. 2008) (court rejected defendant’s claim his guilty plea was insufficient because there was no evidence of *corpus delicti* independent of his admission at change-of-plea proceeding).

801.d.2.A.064 The Arizona Supreme Court has never adopted the “trustworthiness” doctrine for *corpus delicti*.

State v. Carlson, 237 Ariz. 381, 351 P.3d 1079, ¶¶ 10, 15 (2015) (court held evidence was sufficient under either *corpus delicti* or trustworthiness corroboration rule).

801.d.2.A.065 Because the *corpus delicti* rule applies only to extra-judicial statements, it does not apply to a defendant’s testimony in court.

State v. Rubiano, 214 Ariz. 184, 150 P.3d 271, ¶ 10 (Ct. App. 2008) (court cites numerous cases from other jurisdictions holding *corpus delicti* rule does not apply to in-court testimony).

801.d.2.A.067 In order for the state to establish the *corpus delicti* of the crime, the state does not have to produce the body of the victim.

State v. Hall, 204 Ariz. 442, 65 P.3d 90, ¶ 48 (2003) (even though state never found body of victim, state presented evidence victim was missing and circumstantial evidence that victim met with foul play, and evidence of others using victim’s property was sufficient for jurors to conclude victim was dead and that death resulted from criminal conduct; court noted only Texas requires production of body of victim, and court stated it declines to adopt that rule).

801.d.2.A.069 In order for the state to establish the *corpus delicti* of the crime, the state does not have to prove the cause of death.

State v. Morris, 215 Ariz. 324, 160 P.3d 203, ¶¶ 33–36 (2007) (evidence showed following: bodies were found naked in alley; drag marks indicated they had been moved to alley; DNA on clothing in defendant’s camper matched DNA of bodies; one body had defendant’s DNA under her fingernails; hair extensions found in defendant’s camper were similar to hair extensions of one body; and defendant possessed identification cards from one body when arrested; defendant contended evidence did not establish *corpus delicti* because medical examiners believed both deaths resulted from drug overdoses; court held state did not have to prove cause of death).

HEARSAY

801.d.2.A.070 The state need not prove the *corpus delicti* beyond a reasonable doubt; all the state need do is present facts that would allow a reasonable inference of the *corpus delicti*.

State v. Morris, 215 Ariz. 324, 160 P.3d 203, ¶¶ 33–35 (2007) (court held following evidence established *corpus delicti*: bodies were found naked in alley; drag marks indicated they had been moved to alley; DNA on clothing in defendant’s camper matched DNA of bodies; one body had defendant’s DNA under her fingernails; hair extensions found in defendant’s camper were similar to hair extensions of one body; and defendant possessed identification cards from one body when arrested).

State v. Gerlaugh, 134 Ariz. 164, 170, 654 P.2d 800, 806 (1982) (noted *corpus delicti* need not be proved beyond reasonable doubt; condition and location of body corroborated defendant’s statement).

State v. Sarullo, 219 Ariz. 431, 199 P.3d 686, ¶¶ 6–10 (Ct. App. 2008) (defendant was victim’s ex-boyfriend; victim kept gun unloaded on closet shelf; on 8/25, victim awoke at night and saw defendant standing in her bedroom; defendant walked over to victim, pointed gun at her, and threatened her; after defendant put down gun and left, victim saw it was her gun and it was loaded; after being arrested, defendant told police he had entered victim’s home 8/24 and took gun; defendant contended there was no *corpus delicti* for burglary and theft for entering and taking gun on 8/24; court stated that, although there was no evidence, apart from defendant’s confession, of 8/24 burglary and theft, there was uncontradicted evidence of 8/25 burglary and aggravated assault, thus there was independent evidence of “closely related” crimes; moreover, defendant had told victim that he had entered her home 8/24 and had taken her gun, and gun was unloaded when taken and loaded when recovered; court concluded defendant’s confession was sufficiently corroborated and that evidence supported reasonable inference he committed 8/24 offenses).

State v. Barragan-Sierra, 219 Ariz. 276, 196 P.3d 879, ¶ 12 (Ct. App. 2008) (defendant was convicted of conspiracy to commit human smuggling; court stated “evidence offered to support the inference need not even be admissible at trial”; court held following evidence supported reasonable inference that defendant committed offense: (1) when officers tried to stop truck, it sped off reaching speeds in excess of 100 mph; (2) once truck stopped, driver and three other persons fled into nearby cornfield and were not found; (3) defendant was found with four other persons hiding under piece of carpet in bed of truck; (4) defendant appeared tired and his clothes were soiled; and (5) federal documents showed defendant was not in country legally).

State v. Alatorre, 191 Ariz. 208, 953 P.2d 1261, ¶ 14 (Ct. App. 1998) (victim’s statement “and they licked me and stuff” was sufficient to allow admission of defendant’s statement that he “licked [the victim] between the legs”).

801.d.2.A.080 The state need only show that a certain offense has occurred; the state need not present independent evidence that raises the offense to a higher degree.

State v. Flores, 202 Ariz. 221, 42 P.3d 1186, ¶¶ 8–11 (Ct. App. 2002) (defendant was found with two small rocks of crack cocaine, and when questioned, told officers he was holding drugs for third person who would tell him to whom to deliver the drugs; state charged defendant with possession for sale; state contended possession for sale was merely higher degree of possession, but court disagree and held possession for sale was quantitatively different from possession; because only evidence of sale was defendant’s statement, there was no *corpus delicti* for crime of possession for sale, thus trial court properly suppressed defendant’s statement).

801.d.2.A.085 If a defendant confesses to several closely related events, the corroborating evidence does not have to support each of the charged offenses as long as the corroborating evidence supports some of them.

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State v. Sarullo, 219 Ariz. 431, 199 P.3d 686, ¶¶ 6–10 (Ct. App. 2008) (defendant was victim’s ex-boyfriend; victim kept gun unloaded on closet shelf; on 8/25, victim awoke at night and saw defendant standing in her bedroom; defendant walked over to victim, pointed gun at her, and threatened her; after defendant put down gun and left, victim saw it was her gun and it was loaded; after being arrested, defendant told police he had entered victim’s home 8/24 and took gun; defendant contended there was no *corpus delicti* for burglary and theft for entering and taking gun on 8/24; court stated that, although there was no evidence, apart from defendant’s confession, of 8/24 burglary and theft, there was uncontradicted evidence of 8/25 burglary and aggravated assault, thus there was independent evidence of “closely related” crimes; moreover, defendant had told victim that he had entered her home 8/24 and had taken her gun, and gun was unloaded when taken and loaded when recovered; court concluded defendant’s confession was sufficiently corroborated and that evidence supported reasonable inference he committed 8/24 offenses).

State v. Morgan, 204 Ariz. 166, 61 P.3d 460, ¶¶ 17–23 (Ct. App. 2002) (defendant was charged with two counts of sexual conduct with minor based on oral sexual conduct, one count of child molestation for touching victim’s genitals with his hand, and one count of sexual assault for engaging in sexual intercourse with victim without her consent; defendant confessed that he engaged in oral sexual contact with victim; neither victim nor any other witness testified about any oral sexual contact; defendant contended there was no *corpus delicti* for sexual conduct counts; although there was no independent evidence of oral sexual contact, following evidence was presented about other offenses: victim testified that defendant touched her between legs and had forceful sexual intercourse with her, and witness saw defendant and victim in back seat of car, both naked from waist down, and with victim straddling defendant; court held that, even though there was no independent evidence of oral sexual contact, there was evidence to support the other charged offenses, which were closely related, and this supported a reasonable inference the oral sexual conduct had occurred).

801.d.2.A.130 An admission may be written or spoken.

Randall v. Alvarado-Wells, 187 Ariz. 308, 928 P.2d 732 (Ct. App. 1996) (although defendant denied making any statements to witnesses, they testified she made certain statements, thus statements were admissions by a party and not hearsay).

Paragraph (d)(2)(B) — Statements that are not hearsay: Statement adopted by party.

801.d.2.B.010 An out-of-court statement is not hearsay if a party has adopted the statement or indicated that the party believes the statement to be true.

State v. Anderson, 210 Ariz. 327, 111 P.3d 369, ¶¶ 31–36 (2005) (because defendant agreed with and expounded upon statement about premeditation attributed to other person, trial court correctly found that defendant had adopted statement).

Taylor-Bertling v. Foley, 233 Ariz. 394, 313 P.3d 537, ¶¶ 14–16 (Ct. App. 2013) (plaintiff fell over pot placed in hallway of defendant’s home; defendant received e-mail from father in which he stated, “As I said to you at the time, having something low to the floor in the hallway, that is easy to overlook and therefore easy to stumble over, was really dumb; please give Dianne (plaintiff)” my best wishes; defendant forwarded e-mail to Dianne (plaintiff); court found defendant did not intend to adopt that statement by forwarding it to plaintiff).

Standard Chartered PLC v. Price Waterhouse, 190 Ariz. 6, 945 P.2d 317 (Ct. App. 1996) (because defendant-seller was unable to show who wrote the memorandum or that plaintiff-buyer had adopted it, trial court properly excluded it).

HEARSAY

Paragraph (d)(2)(C) — Statements that are not hearsay: Statement by authorized person.

801.d.2.C.030 This section allows for admission of factual statements by agents or employees, and not opinions on the law from a party's counsel.

State v. Fulminante, 193 Ariz. 485, 975 P.2d 75, ¶ 18 (1999) (prosecutor's opinion that, without confession, state's case was insufficient to prove guilt was not admissible under this section).

Paragraph (d)(2)(D) — Statements that are not hearsay: Statement by party's agent.

801.d.2.D.020 A statement by an agent is admissible against a principal if it was (1) made by the principal's agent or servant, (2) made during the existence of the agency relationship, and (3) concerned matters within the scope of the agency or employment.

Vanoss v. BHP Copper Inc., 244 Ariz. 90, 418 P.3d 457, ¶ 23 (Ct. App. 2018) (BHP began rebuilding certain facilities at ore mine that had been inoperable for several years; BHP (1) hired Tetra Tech as independent contractor to refurbish ore chute system in secondary crusher building; (2) separately contracted with Stantec Consulting Services to provide general construction and safety management for project; and (3) hired Atwell Anderson as project's general contractor; during work on project, Vanoss died from apparent fall from fourth floor of secondary crusher building; family contended trial court erroneously precluded Stantec employee from testifying that, when she complained to certain Stantec and Atwell employees about safety conditions, they responded that they "were losing a lot of money on this job, and that [they] had to have workforce reduction"; court held that, even assuming these employees made their statements as agents or employees on matter within scope of their respective companies' relationship with BHP while it existed, it was not apparent whether purported admissions related to actions and motivations of BHP rather than Stantec or Atwell).

State ex rel. Ariz. DHS v. Gottsfeld (Medrano), 213 Ariz. 583, 146 P.3d 574, ¶ 11 (Ct. App. 2006) (because statements made by petitioner's employees about matters within scope of their employment would be imputed to employer, trial court erred in ordering that respondent's attorney could conduct *ex parte* interviews with petitioner's employees).

Henry v. Healthpartners of Southern Arizona, 203 Ariz. 393, 55 P.3d 87, ¶¶ 6–9 (Ct. App. 2002) (medical malpractice action resulting from death from cancer filed against decedent's doctor, radiologist employed by medical center, and medical center (TMC/HSA); plaintiff settled with doctors and went to trial against TMC/HSA; TMC/HSA named doctors as non-parties at fault; plaintiff's trial strategy was to minimize radiologist's fault in order to place more of blame on TMC/HSA; court held factual allegations in complaint of radiologist's negligence were made by plaintiff's attorney during existence of agency relationship and were within scope of agency, thus they were admissible against plaintiff).

Hernandez v. State, 201 Ariz. 336, 35 P.3d 97, ¶¶ 8–9 (Ct. App. 2001) (plaintiff fell off wall at Patagonia Lake Park; because plaintiff testified there was no trail and that he stepped off retaining wall, notice of claim letter to state from plaintiff's attorney stating plaintiff was walking on trail and stepped off cliff was admissible as prior inconsistent statement), *vacated*, 203 Ariz. 196, 52 P.3d 765 (2002).

801.d.2.D.023 Because a party's disclosure statement prepared by the party's attorney was (1) made by the party's agent, (2) made during the existence of the agency relationship, and (3) concerned matters within the scope of the agency or employment, it is not hearsay and may be offered as affirmative evidence of the truth of the matters asserted.

Ryan v. San Francisco Peaks Truck. Co., 228 Ariz. 42, 262 P.3d 863, ¶¶ 12–17 (Ct. App. 2011) (court held trial court properly ruled plaintiff's disclosure statement was admissible as admission by party-opponent, but further held evidence was not conclusive of nonparty-at-fault, thus plaintiff was properly given opportunity to explain or deny information contained in disclosure statement).

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801.d.2.D.025 This section allows for admission of factual statements by agents or employees, and not opinions on the law from a party's counsel.

State v. Fulminante, 193 Ariz. 485, 975 P.2d 75, ¶ 18 (1999) (prosecutor's opinion that, without confession, state's case was insufficient to prove guilt beyond a reasonable doubt was not admissible under this section).

Paragraph (d)(2)(E) — Statements that are not hearsay: Statement by co-conspirator.

801.d.2.E.005 A statement by a co-conspirator is admissible.

State v. Montañño, 204 Ariz. 413, 65 P.3d 61, ¶¶ 67–68 (2003) (court stated that defendant seemed to concede existence of conspiracy, but “unconvincingly argues that there is no evidence linking him to it”; trial court thus did not abuse discretion in allowing witness to testify about conversation he overheard between two other inmates).

State v. Nordstrom, 200 Ariz. 229, 25 P.3d 717, ¶ 55 (2001) (statement of third person to defendant about committing robbery was admissible).

801.d.2.E.050 In order to admit the statement of a co-conspirator, the trial court must find the existence of three factors, the first of which is that a conspiracy existed and both the defendant and the declarant were parties to it.

State v. Dunlap, 187 Ariz. 441, 930 P.2d 518 (Ct. App. 1996) (state contended declarant and defendant were conspiring to cover up involvement in killing and obstruct investigation and prosecution).

801.d.2.E.060 In order to admit the statement of a co-conspirator, the trial court must find the existence of three factors, the second of which is that the co-conspirator made the statement during the course of the conspiracy.

State v. Dunlap, 187 Ariz. 441, 930 P.2d 518 (Ct. App. 1996) (state contended declarant made diary entries while he and defendant were conspiring to cover up their involvement in killing and obstruct investigation and prosecution of case).

801.d.2.E.070 In order to admit the statement of a co-conspirator, the trial court must find the existence of three factors, the third of which is that the co-conspirator made the statement in furtherance of the conspiracy.

State v. Dunlap, 187 Ariz. 441, 930 P.2d 518 (Ct. App. 1996) (because declarant could have used diary entries to formulate plan to cover up involvement in killing and obstruct investigation and prosecution of case, and remind him of things to do to accomplish this, trial court did not abuse discretion in concluding diary entries were in furtherance of conspiracy).

April 1, 2020

Rule 802. The Rule Against Hearsay.

Hearsay is not admissible unless any of the following provides otherwise:

- an applicable constitutional provision or statute;
- these rules; or
- other rules prescribed by the Supreme Court.

Comment on 2012 Amendment

The language of Rule 802 has been amended to conform to the federal restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

NOTE: On March 8, 2004, the United States Supreme Court decided *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), which greatly changed the law in determining whether admission of certain hearsay statements violated the confrontation clause. Cases decided prior to that date holding that admission of certain statements did not violate the confrontation clause therefore may no longer be good law.

Cases

802.010 Evidence that is hearsay is inadmissible.

State v. Escalante-Orozco, 241 Ariz. 254, 386 P.3d 798, ¶¶ 62–67 (2017) (trial court properly excluded as hearsay witness’s statement that victim (now deceased) told her that victim’s boyfriend had bruised her arm and that he was violent with his wife).

Higgins v. Higgins, 194 Ariz. 266, 981 P.2d 134, ¶¶ 27–29 (Ct. App. 1999) (father’s testimony of what his mother told him children told her was double hearsay, and because neither level came under some hearsay exception, trial court should not have admitted testimony).

Cervantes v. Rijlaarsdam, 190 Ariz. 396, 949 P.2d 56 (Ct. App. 1997) (trial court allowed defendants to question plaintiff about letter from plaintiff’s former employer; because letter was hearsay, trial court did not err in precluding defendants from reading letter).

Keith Equip. v. Casa Grande Cotton Fin., 187 Ariz. 259, 928 P.2d 683 (Ct. App. 1996) (trial court erred in admitting hearsay statement merely because declarant was available).

802.015 Hearsay evidence is admissible as provided by applicable statute.

In re Juv. Action No. JS–7499, 163 Ariz. 153, 156–57, 786 P.2d 1004, 1007–08 (Ct. App. 1989) (father was convicted of rape and sodomy upon his daughter; in action to terminate father’s parent-child relationship with daughter, trial court properly allowed admission in evidence transcript of daughter’s testimony at father’s trial on rape and sodomy charges).

802.020 Sixth Amendment right to confront and cross-examine the witness applies only in criminal proceedings, and does not apply in civil proceedings.

In re Juv. Action No. JS–7499, 163 Ariz. 153, 157–59, 786 P.2d 1004, 1008–10 (Ct. App. 1989) (father was convicted of rape and sodomy upon his daughter; in action to terminate father’s parent-child relationship with daughter, trial court allowed admission in evidence transcript of daughter’s testimony at father’s trial on rape and sodomy charges; father contended this violated his right of confrontation; court noted that proceeding to terminate parental rights is civil in nature, and held that right of confrontation did not apply; court further held that, because father had opportunity to cross-examine daughter at criminal trial, admission of transcript of her testimony did not violate his due process right to cross-examine witness).

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802.030 If hearsay evidence is admitted without objection, it becomes competent evidence admissible for all purposes, unless its admission amounts to fundamental error.

State v. Allen, 157 Ariz. 165, 171, 755 P.2d 1153, 1159 (1988) (court noted, however, such evidence is not conclusive proof of matter for which it is offered, and when such evidence is sole proof of an essential element of state's case against defendant, reversal may be warranted if admission of evidence amounted to fundamental error).

State v. McGann, 132 Ariz. 296, 299, 645 P.2d 811, 814 (1982) (court noted majority rule is that hearsay admitted without objection is competent evidence for all purposes, but held such evidence is not conclusive proof; as such, reversal may be required if hearsay evidence is only proof of essential element of state's case, and if admission is fundamental error).

State v. Ingram, 239 Ariz. 228, 368 P.3d 936, ¶ 23 n.6 (Ct. App. 2016) (officer testified personnel at U.S. Marshals Service said defendant was possibly armed with .40 caliber pistol; although this appeared to be hearsay, defendant objected on basis of "foundation" and not "hearsay").

802.035 Although a defendant is entitled to a hearing on a motion to redetermine the conditions of release under Rule 7.4(b) of the Arizona Rules of Criminal Procedure, Rule 7.4(c) provides the trial court may make release determinations based on evidence not admissible under the Rules of Evidence.

Mendez v. Robertson (State), 202 Ariz. 128, 42 P.3d 14, ¶ 10 (Ct. App. 2002) (trial court properly considered prosecutor's avowals of what victim would say, and defendant did not have right to cross-examine victim).

802.050 The Arizona Legislature is permitted to enact a statute allowing the admission of hearsay provided the statute is reasonable and workable and supplements the rules promulgated by the Arizona Supreme Court.

State v. Vincent, 159 Ariz. 418, 768 P.2d 150 (1989) (A.R.S. § 13-4252, which allows for the presentation of videotaped testimony, is constitutional and admission of such testimony is permissible as long as the trial court makes the necessary findings).

In re Maricopa Cty. Ju. No. JD-6123, 191 Ariz. 384, 956 P.2d 511 (Ct. App. 1997) (Juvenile Rule 16.1(f) is a reasonable and workable supplement to the Arizona Rules of Evidence).

802.055 Although the Arizona Legislature is permitted to enact a statute allowing the admission of hearsay provided the statute is reasonable and workable and supplements the rules promulgated by the Arizona Supreme Court, if a conflict arises, or a statutory rule tends to engulf a rule the court has promulgated, the court rule will prevail.

State v. Taylor, 196 Ariz. 584, 2 P.3d 674, ¶¶ 4-11 (Ct. App. 1999) (A.R.S. § 13-4252 allows for admission of pretrial videotaped statement made by minor; this statute is both more and less restrictive than existing hearsay exceptions, and so it engulfs Rules of Evidence and is thus unconstitutional).

802.110 Hearsay evidence that is improperly admitted may be harmless error.

State v. Lamar, 205 Ariz. 431, 72 P.3d 831, ¶¶ 38-44 (2003) (trial court had granted defendant's request to preclude evidence that Richard, in defendant's presence, threatened Hogan by asking her if she would like to be buried next to Jones (victim in this case); at trial, prosecutor asked Hogan if anyone made threats against her in defendant's presence, and she responded, "When Richard said they was [*sic*] going to bury me next to—," whereupon defendant objected and asked for mistrial, which trial court denied; court noted that trial court had concluded Richard's threat was hearsay, but concluded any error was harmless because (1) statement did not necessarily implicate defendant, and (2) trial court instructed jurors to disregard that testimony).

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State v. Dickens, 187 Ariz. 1, 19, 926 P.2d 468, 486 (1996) (although theft report did not qualify as business record, because victim of theft testified to same information as in report, any error in admitting report was harmless).

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Rule 803. Exceptions to the Rule Against Hearsay—Regardless of Whether the Declarant Is Available as a Witness.

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:

(1) *Present Sense Impression*. A statement describing or explaining an event or condition, made while or immediately after the declarant perceived it.

(2) *Excited Utterance*. A statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused.

(3) *Then-Existing Mental, Emotional, or Physical Condition*. A statement of the declarant's then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the validity or terms of the declarant's will.

(4) *Statement Made for Medical Diagnosis or Treatment*. A statement that:

(A) is made for—and is reasonably pertinent to—medical diagnosis or treatment; and

(B) describes medical history; past or present symptoms or sensations; their inception; or their general cause.

(5) *Recorded Recollection*. A record that:

(A) is on a matter the witness once knew about but now cannot recall well enough to testify fully and accurately;

(B) was made or adopted by the witness when the matter was fresh in the witness's memory; and

(C) accurately reflects the witness's knowledge.

If admitted, the record may be read into evidence but may be received as an exhibit only if offered by an adverse party.

(6) *Records of a Regularly Conducted Activity*. A record of an act, event, condition, opinion, or diagnosis if:

(A) the record was made at or near the time by—or from information transmitted by—someone with knowledge;

(B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;

(C) making the record was a regular practice of that activity;

(D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification; and

(E) the opponent does not show that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.

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(7) *Absence of a Record of a Regularly Conducted Activity.* Evidence that a matter is not included in a record described in paragraph (6) if:

(A) the evidence is admitted to prove that the matter did not occur or exist;

(B) a record was regularly kept for a matter of that kind; and

(C) the opponent does not show that the possible source of the information or other circumstances indicate a lack of trustworthiness.

(8) *Public Records.* A record or statement of a public office if:

(A) it sets out:

(i) the office's activities;

(ii) a matter observed while under a legal duty to report, but not including, in a criminal case, a matter observed by law-enforcement personnel; or

(iii) in a civil case or against the government in a criminal case, factual findings from a legally authorized investigation; and

(B) the opponent does not show that the source of information or other circumstances indicate a lack of trustworthiness.

(9) *Public Records of Vital Statistics.* A record of a birth, death, or marriage, if reported to a public office in accordance with a legal duty.

(10) *Absence of a Public Record.* Testimony—or a certification under Rule 902—that a diligent search failed to disclose a public record or statement if:

(A) the testimony or certification is admitted to prove that

(1) the record or statement does not exist; or

(2) a matter did not occur or exist, if a public office regularly kept a record or statement for a matter of that kind; and

(B) in a criminal case, a prosecutor who intends to offer a certification provides written notice that intent at least 20 days before trial, and the defendant does not object in writing within 10 days of receiving the notice—unless the court sets a different time for the notice or the objection.

(11) *Records of Religious Organizations Concerning Personal or Family History.* A statement of birth, legitimacy, ancestry, marriage, divorce, death, relationship by blood or marriage, or similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) *Certificates of Marriage, Baptism, and Similar Ceremonies.* A statement of fact contained in a certificate:

(A) made by a person who is authorized by a religious organization or by law to perform the act certified;

(B) attesting that the person performed a marriage or similar ceremony or administered a sacrament; and

(C) purporting to have been issued at the time of the act or within a reasonable time after it.

(13) *Family Records.* A statement of fact about personal or family history contained in a family record, such as a Bible, genealogy, chart, engraving on a ring, inscription on a portrait, or engraving on an urn or burial marker.

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(14) *Records of Documents That Affect an Interest in Property.* The record of a document that purports to establish or affect an interest in property if:

- (A)** the record is admitted to prove the content of the original recorded document, along with its signing and its delivery by each person who purports to have signed it;
- (B)** the record is kept in a public office; and
- (C)** a statute authorizes recording documents of that kind in that office.

(15) *Statements in Documents That Affect an Interest in Property.* A statement contained in a document that purports to establish or affect an interest in property if the matter stated was relevant to the document's purpose—unless later dealings with the property are inconsistent with the truth of the statement or the purport of the document.

(16) *Statements in Ancient Documents.* A statement in a document that was prepared before January 1, 1998, and whose authenticity is established.

(17) *Market Reports and Similar Commercial Publications.* Market quotations, lists, directories, or other compilations that are generally relied on by the public or by persons in particular occupations.

(18) *Statements in Learned Treatises, Periodicals, or Pamphlets.* A statement contained in a treatise, periodical, or pamphlet if:

- (A)** the statement is called to the attention of an expert witness on cross-examination or relied on by the expert on direct examination; and
- (B)** the publication is established as a reliable authority by the expert's admission or testimony, by another expert's testimony, or by judicial notice.

If admitted, the statement may be read into evidence but not received as an exhibit.

(19) *Reputation Concerning Personal or Family History.* A reputation among a person's family by blood, adoption, or marriage—or among a person's associates or in the community—concerning the person's birth, adoption, legitimacy, ancestry, marriage, divorce, death, relationship by blood, adoption, or marriage, or similar facts of personal or family history.

(20) *Reputation Concerning Boundaries or General History.* A reputation in a community—arising before the controversy—concerning boundaries of land in the community or customs that affect the land, or concerning general historical events important to that community, state, or nation.

(21) *Reputation Concerning Character.* A reputation among a person's associates or in the community concerning the person's character.

(22) *Judgment of a Previous Conviction.* Evidence of a final judgment of conviction if:

- (A)** the judgment was entered after a trial or guilty plea, but not nolo contendere plea;
- (B)** the conviction was for a crime punishable by death or by imprisonment for more than a year;
- (C)** the evidence is admitted to prove any fact essential to the judgment; and
- (D)** when offered by the prosecutor in a criminal case for a purpose other than impeachment, the judgment was against the defendant.

The pendency of an appeal may be shown but does not affect admissibility.

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(23) *Judgments Involving Personal, Family, or General History or a Boundary*. A judgment that is admitted to prove a matter of personal, family, or general history, or boundaries, if the matter:

(A) was essential to the judgment; and

(B) could be proved by evidence of reputation.

(24) [Other exceptions.] [Transferred to Rule 807.]

(25) *Former testimony (non-criminal action or proceeding)*. Except in a criminal action or proceeding, testimony given as a witness at another hearing of the same or different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

Comment to 2018 Amendment to Rule 803(16)

The ancient documents exception to the rule against hearsay has been limited to statements in documents prepared before January 1, 1998. The Court has determined that the ancient documents exception should be limited due to the risk that it will be used as a vehicle to admit vast amounts of unreliable electronically stored information (ESI). Given the exponential development and growth of electronic information since 1998, the hearsay exception for ancient documents has now become a possible open door for large amounts of unreliable ESI, as no showing of reliability needs to be made to qualify under the exception.

The Court is aware that in certain cases—such as cases involving latent diseases and environmental damage—parties must rely on hardcopy documents from the past. The ancient documents exception remains available for such cases for documents prepared before 1998. Going forward, it is anticipated that any need to admit old hardcopy documents produced after January 1, 1998 will decrease, because reliable ESI is likely to be available and can be offered under a reliability based hearsay exception. Rule 803(6) may be used for many of these ESI documents, especially given its flexible standards on which witnesses might be qualified to provide an adequate foundation. And Rule 807 can be used to admit old documents upon a showing of reliability—which will often (though not always) be found by circumstances such as that the document was prepared with no litigation motive in mind, close in time to the relevant events. The limitation of the ancient documents exception is not intended to raise an inference that 20 year-old documents are, as a class, unreliable, or that they should somehow not qualify for admissibility under Rule 807. Finally, many old documents can be admitted for the non-hearsay purpose of proving notice, or as party-opponent statements.

Under the amendment, a document is “prepared” when the statement proffered was recorded in that document. For example, if a hardcopy document is prepared in 1995, and a party seeks to admit a scanned copy of that document, the date of preparation is 1995 even though the scan was made long after that—the subsequent scan does not alter the document. The relevant point is the date on which the information is recorded, not when the information is prepared for trial. However, if the content of the document is itself altered after the cut-off date, then the hearsay exception will not apply to statements that were added in the alteration.

Comment to 2015 Amendment to Rule 803(6)

The rule has been amended to clarify that if the proponent has established the stated requirements of the exception—regular business with regularly kept record, source with personal knowledge, record made timely, and foundation testimony or certification—then the burden is on the opponent to show that the source of information or the method or circumstances of preparation indicate a lack of trustworthi-

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ness. It is appropriate to impose this burden on opponent, as the basic admissibility requirements are sufficient to establish a presumption that the record is reliable.

The opponent, in meeting its burden, is not necessarily required to introduce affirmative evidence of untrustworthiness. For example, the opponent might argue that a record was prepared in anticipation of litigation and is favorable to the preparing party without needing to introduce evidence on the point. A determination of untrustworthiness necessarily depends on the circumstances.

Comment to 2015 Amendment to Rule 803(7)

The rule has been amended to clarify that if the proponent has established the stated requirements of the exception—set forth in Rule 803(6)—then the burden is on the opponent to show that the possible source of the information or other circumstances indicate a lack of trustworthiness. The amendment maintains consistency with the amendment to the trustworthiness clause of Rule 803(6).

Comment to 2015 Amendment to Rule 803(8)

The rule has been amended to clarify that if the proponent has established that the record meets the stated requirements of the exception—prepared by a public office and setting out information as specified in the rule—then the burden is on the opponent to show that the source of information or other circumstances indicate a lack of trustworthiness. Public records have justifiably carried a presumption of reliability. The amendment maintains consistency with the amendment to the trustworthiness clause of Rule 803(6).

Comment to 2014 Amendment

Rule 803(10) has been amended to incorporate, with minor variations, a “notice-and-demand” procedure that was approved in *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009). This amendment is not intended to alter any otherwise applicable disclosure requirements.

Comment to 2012 Amendment

To conform to Federal Rule of Evidence 803(6)(A), as restyled, the language “first hand knowledge” in Rule 803(6)(b) has been changed to “knowledge” in amended Rule 803(6)(A). The new language is not intended to change the requirement that the record be made by—or from information transmitted by— someone with personal or first hand knowledge.

To conform to Federal Rules of Evidence 803(24) and 807, Rule 803(24) has been deleted and transferred to Rule 807.

Rule 803(25) has not been amended to conform to the federal rules.

Otherwise, the language of Rule 803 has been amended to conform to the federal restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent in the restyling to change any result in any ruling on evidence admissibility.

Comment to 1994 Amendment

For provisions governing former testimony in criminal actions or proceedings, *see* Rule 804(b)(1) and Rule 19.3(c), Rules of Criminal Procedure.

NOTE: On March 8, 2004, the United States Supreme Court decided *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. d. 177 (2004), which greatly changed the law in determining whether admission of certain hearsay statements violated the confrontation clause. Cases decided prior to that date holding that admission of certain statements did not violate the confrontation clause therefore may no longer be good law.

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Cases

803.013 Statements made during police interrogation under circumstances objectively indicating that the primary purpose of the interrogation was to enable police assistance to meet an ongoing emergency are not testimonial.

State v. Boggs, 218 Ariz. 325, 185 P.3d 111, ¶¶ 55–58 (2008) (officers arrived and spoke to victim, who was outside restaurant and had been shot twice; at trial, officers testified about victim’s statements; court held victim’s statements described what appeared to be ongoing emergency, thus they were non-testimonial).

State v. Alvarez, 213 Ariz. 467, 143 P.3d 668, ¶¶ 12, 18–19 (Ct. App. 2006) (officer found victim with blood on face and hair; officer asked victim what happened, and victim said three men had jumped him and had taken his car; victim died before trial; court held that, although victim gave answers in response to officer’s question, primary purpose of question was to enable police assistance to meet an ongoing emergency and not to establish or prove past events for later criminal prosecution, thus victim’s statement was not testimonial and admission did not violate confrontation clause).

State v. King, 212 Ariz. 372, 132 P.3d 311, ¶¶ 2–6, 29–32 (Ct. App. 2006) (declarant called 9-1-1 and requested that officers come to her house, said she had restraining order against defendant, who had just thrown two puppies over her house; when operator asked where defendant was, declarant said he “just drove off” and that she did not know where he was; in response to further questions, declarant identified defendant by name, date of birth, clothing, and race, and provided model and color of vehicle; court reversed conviction and stated that, on remand, trial court should consider which portions of 9-1-1 might be admissible and which parts might not be admissible).

803.014 Statements made during police interrogation under circumstances objectively indicating that there is no ongoing emergency, and that the primary purpose is to establish or prove past events potentially relevant to later criminal prosecution are testimonial.

State v. Parks, 213 Ariz. 412, 142 P.3d 720, ¶¶ 4–7 (Ct. App. 2006) (police arrived after victim had been killed; after determining that defendant’s son and brother had witnessed shooting, police separated and questioned them; because conduct showed police were operating in investigative mode, statements were testimonial, thus admission violated confrontation clause).

State v. King, 212 Ariz. 372, 132 P.3d 311, ¶¶ 2–6, 29–32 (Ct. App. 2006) (declarant called 9-1-1 and requested that officers come to her house, said she had restraining order against defendant, who had just thrown two puppies over her house; when operator asked where defendant was, declarant said he “just drove off” and that she did not know where he was; in response to further questions, declarant identified defendant by name, date of birth, clothing, and race, and provided model and color of vehicle; court reversed conviction and stated that, on remand, trial court should consider which portions of 9-1-1 might be admissible and which parts might not be admissible).

803.016 If the out-of-court statement is the functional equivalent of in-court testimony or was made under circumstances that the declarant would reasonably expect to be available at trial, it will be considered “testimonial evidence” or “testimonial statement” and thus will not be admissible unless (1) the declarant is unavailable, and (2) the defendant has had a prior opportunity to cross-examine the declarant.

State v. Parks, 211 Ariz. 19, 116 P.3d 631, ¶¶ 36–53 (Ct. App. 2005) (defendant’s son witnessed actions that killed victim; officer interviewed son, who was emotional at time; son died before trial; court held son’s statement was as excited utterance; court further held son’s statement was “testimonial statement” because: (1) officer knew defendant had killed victim prior to interview; (2) defendant had already been arrested; (3) there were no exigent safety, security, or medical concerns; (4) officer’s questioning was not casual encounter; (5) officer separated son and other witness before questioning; (6) officer was in investigative mode; (7) purpose of questioning was to obtain informa-

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tion about potential crime; and (8) son appeared to appreciate that what he had witnessed would have significance to future criminal prosecution; court held admission of son's statement violated defendant confrontation clause), *aff'd*, 213 Ariz. 412, 142 P.3d 720, ¶ 8 (Ct. App. 2006).

803.017 If the out-of-court statement is not the functional equivalent of in-court testimony or was not made under circumstances that the declarant would reasonably expect to be available at trial, it will not be considered a "testimonial statement" or "testimonial evidence" and thus its admissibility will be controlled by the rules governing hearsay statements.

State v. Alvarez, 213 Ariz. 467, 143 P.3d 668, ¶¶ 16–17 (Ct. App. 2006) (officer found victim staggering down road with blood in hair and on face; officer asked victim what happened, and victim said three men had jumped him and had taken his car; victim died before trial; court held that, although victim gave answers in response to officer's question, there was nothing in record to suggest victim would have reasonably expected his statement to be used in a later criminal prosecution, thus statement was not testimonial and admission did not violate confrontation clause).

State v. Aguilar, 210 Ariz. 51, 107 P.3d 377, ¶¶ 2–13 (Ct. App. 2005) (in prosecution for murder, state sought to admit testimony by victim's son of excited utterance made by victim, and testimony by victim's wife's brother-in-law of excited utterance made by victim's wife; court held in-court testimony by lay witness of out-of-court excited utterances that lay witness heard was not "testimonial statement" that must satisfy Sixth Amendment).

State v. Alvarez, 210 Ariz. 24, 107 P.3d 350, ¶¶ 18–22 (Ct. App. 2005) (officer found victim with blood on face and hair; officer asked victim what happened, and victim said three men jumped him and took his car; victim died before trial; court held that, although victim gave answers in response to officer's questions, this was not "police interrogation": victim did not call police, but rather officer had found victim; officer did not know that crime had been committed, but rather was questioned victim about injuries in order to obtain medical help for him; questioning was neither structured nor conducted for purpose of producing evidence in anticipation of potential criminal prosecution, thus was not "testimonial statement"), *vac'd*, 213 Ariz. 467, 143 P.3d 668, ¶ 2 (Ct. App. 2006).

803.019 This rule allows hearsay testimony even when the declarant is available; there is still a requirement that, if the declarant is not identified, the proponent of the evidence has the burden of establishing the circumstantial trustworthiness of the statement.

State v. Bass, 198 Ariz. 571, 12 P.3d 796, ¶¶ 31–33 (2000) (defendant drove above speed limit in right lane when vehicle in left lane moved partially into right lane, whereupon defendant swerved right and vehicle's right wheels rode curb for moment, until passenger grabbed steering wheel and jerked it to left, which caused defendant to lose control of vehicle, which then spun across center line and into incoming traffic, causing multi-car collision and death and injuries to others; declarant stopped and made statement about defendant's speed to driver of vehicle that had moved toward right lane; court noted sole evidence of declarant's personal perception was declaration itself, and further, person who related hearsay statements was person whose vehicle had move partially into defendant's lane, thus that person had motive to shift all blame to defendant; court therefore concluded hearsay statement had insufficient trustworthiness to be admissible).

803.020 The constitutional right of confrontation is satisfied when the defendant has the opportunity to cross-examine the witness.

Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 1369 n.9 (2004) (Court stated, "[W]hen the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements.").

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803.025 If a statement falls within a firmly rooted hearsay exception, the statement is considered sufficiently reliable to satisfy the reliability requirement of the confrontation clause.

State v. Bass, 198 Ariz. 571, 12 P.3d 796, ¶¶ 34–38 (2000) (defendant drove above speed limit in right lane when vehicle in left lane moved partially into right lane, whereupon defendant swerved right and vehicle’s right wheels rode curb for moment, until passenger grabbed steering wheel and jerked it to left, which caused defendant to lose control of vehicle, which then spun across center line and into incoming traffic, causing multi-car collision and death and injuries to others; declarant stopped and made statement about defendant’s speed to driver of vehicle that had moved toward right lane, who then related hearsay statements at trial; court concluded statement did not satisfy hearsay requirements for excited utterance, and did not have any other basis to satisfy confrontation clause, thus statement was not admissible).

State v. Wooten, 193 Ariz. 357, 972 P.2d 993, ¶¶ 42–43 (Ct. App. 1998) (murder victim called friend and told her “Vonnie” was at her apartment, “so if anything happens to me you know who was here”; neighbors heard someone knocking on victim’s door and then heard victim say, “I haven’t seen you in a long time”; court held this statement was admissible as present-sense impression exception to hearsay rule, and thus admission satisfied confrontation clause).

803.050 Before a statement is admissible as an exception to the hearsay rule, the proponent of the evidence must show that the declarant had an opportunity to observe, or had personal knowledge of, the fact declared.

State v. Bass, 198 Ariz. 571, 12 P.3d 796, ¶ 20 (2000) (defendant drove above speed limit in right lane when vehicle in left lane moved partially into right lane, whereupon defendant swerved right and vehicle’s right wheels rode curb for moment, until passenger grabbed steering wheel and jerked it to left, which caused defendant to lose control of vehicle, which then spun across center line and into incoming traffic, causing multi-car collision and death and injuries to others; declarant stopped and made statement about defendant’s speed to driver of vehicle that had moved toward right lane; court included language that declarant must personally observe matter in question, but did not discuss that aspect further).

803.060 An out-of-court statement is not admissible merely because the declarant is available to testify at trial; such a hearsay statement is admissible only if it fits under one of the exceptions.

Keith Equip. v. Casa Grande Cotton Fin., 187 Ariz. 259, 928 P.2d 683 (Ct. App. 1996) (trial court erred in admitting hearsay statement merely because declarant was available).

Paragraph (1) — Present sense impressions.

803.1.010 A hearsay statement is admissible as a present sense impression if (1) the declarant perceived the event or condition, (2) the statement described the event or condition, and (3) the declarant made the statement while perceiving the event or condition or immediately thereafter.

State v. Steinle (Moran), 239 Ariz. 415, 372 P.3d 939, ¶¶ 21–23 (2016) (state intended to use cell-phone video recording of fight; defendant contended video contained multiple levels of hearsay, including conduct and people making statements heard on video; court noted that, to extent persons could be heard making statements, those would qualify as present sense impressions or excited utterances).

State v. Payne, 233 Ariz. 484, 314 P.3d 1239, ¶¶ 46–50 (2013) (defendant sought to introduce codefendant’s threats to “kill” children if defendant did not do something about their behavior; trial court did not abuse discretion in determining that statement was not present sense impression).

State v. Smith, 215 Ariz. 221, 159 P.3d 531, ¶ 31 (2007) (because (1) medical examiner was performing autopsy, (2) medical examiner’s statements described autopsy, and (3) medical examiner made statements while performing autopsy, medical examiner’s statements were admissible as present sense impressions).

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State v. Tucker, 205 Ariz. 157, 68 P.3d 110, ¶¶ 38–47 (2003) (trial court admitted as present sense impression witness’s testimony that, during telephone conversation, victim said she had “just got[ten] off the phone” with defendant, that victim sounded upset and crying, and that victim had told her defendant was upset with her and was verbally abusive toward her, and that when she refused to go the defendant’s house, defendant got upset and called her names; court held trial court did not abuse discretion in admitting this statement).

State v. Malone, 245 Ariz. 103, 425 P.3d 592, ¶¶ 31–32 (Ct. App. 2018) (defendant was convicted of killing victim; while victim and her sister were driving to defendant’s house, victim was talking to defendant on cell phone, and sister heard victim say: “So you’re going to keep threatening me . . . well, whatever, I’m still leaving”; defendant contended statement was hearsay; court held statement was admissible as present sense impression).

State v. Wright, 239 Ariz. 284, 370 P.3d 1122, ¶¶ 8–17 (Ct. App. 2016) (undercover officer’s truck had one-way radio transmitter and digital audio recorder hidden inside it; officer asked person to help him buy methamphetamine and described actions of person and defendant that resulted in person’s obtaining methamphetamine; defendant objected that audio recording from officer’s truck was hearsay; court held it was present sense impression; defendant contended that, because officer knew recording could be used at trial, he had motive to fabricate; court noted that officers were maintaining radio contact for officer safety and thus had no motive to fabricate).

State v. Damper, 223 Ariz. 572, 225 P.3d 1148, ¶¶ 16–17 (Ct. App. 2010) (trial court admitted text message from victim’s cell phone that said, “Can you come over; me and Marcus [defendant] are fighting and I have no gas”; court concluded (1) declarant perceived event, (2) statement described event, and (3) use of present tense (we “are fighting”) suggested declarant sent message during fight or shortly after it, thus statement qualified as present-sense impression).

State v. Sucharen, 205 Ariz. 16, 66 P.3d 59, ¶¶ 24–26 (Ct. App. 2003) (state alleged defendant and Doyle were racing when defendant’s vehicle collided with victim’s vehicle, killing victim; two witnesses testified that, as they saw vehicles drive by, one stated, “There goes your *Fast and Furious* movie”; court held this hearsay statement was admissible as present sense impression).

State v. Wooten, 193 Ariz. 357, 972 P.2d 993, ¶¶ 36–41 (Ct. App. 1998) (murder victim called friend and said “Vonnie” was at her apartment, “so if anything happens to me you know who was here”; two neighbors heard someone knocking on victim’s door and then heard victim say, “I haven’t seen you in a long time”; court held this was sufficient evidence that victim perceived the visitor prior to identifying him as “Vonnie,” thus first part of statement satisfied this hearsay exception).

State v. Wooten, 193 Ariz. 357, 972 P.2d 993, ¶ 44 (Ct. App. 1998) (murder victim called friend and said “Vonnie” was at her apartment, “so if anything happens to me you know who was here”; two neighbors heard someone knocking on victim’s door and then heard victim say, “I haven’t seen you in a long time”; court held this was sufficient evidence that victim perceived visitor prior to identifying him as “Vonnie,” and victim’s expression of concern for her own safety was sufficiently tied to event of defendant’s (Vonnie’s) appearance to constitute an “explanation,” thus second part of statement satisfied this hearsay exception).

803.1.020 This rule requires the event and the statement be contemporaneous to a certain degree; to what degree they have to be contemporaneous has never been specified because each case is decided on its individual facts, thus the trial court has latitude and discretion in making this determination.

State v. Tucker, 205 Ariz. 157, 68 P.3d 110, ¶¶ 43–47 (2003) (victim said she had “just got[ten] off the phone” with defendant; court noted this phrase might denote lapse of mere seconds, or could mean passage of longer time; court referred to cases that held statements were present sense impression when declarant walked approximately 100 feet before making statement and when declarant made statement 23 minutes after event; court held that, because trial court observed witness while witness

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described declarant and statement, trial court did not abuse discretion in determining statement was sufficiently contemporaneous with event).

Paragraph (2) — Excited utterances.

803.2.003 Statements made during police interrogation under circumstances objectively indicating that the primary purpose of the interrogation was to enable police assistance to meet an ongoing emergency are not testimonial.

State v. Hausner, 230 Ariz. 60, 280 P.3d 604, ¶¶ 62–67 (2012) (for each statement, officer was one of first to arrive a scene of shooting, and one officer explained he questioned victim in order to secure scene and meet on-going emergency; each victim described where he was standing and vehicle from where shot was fired; court held each statement was excited utterance and not testimonial).

State v. Boggs, 218 Ariz. 325, 185 P.3d 111, ¶¶ 55–58 (2008) (officers spoke to victim, who had been shot twice; at trial, officers testified about victim’s statements; court held victim’s statements described what appeared to be ongoing emergency, thus they were non-testimonial).

State v. Alvarez, 213 Ariz. 467, 143 P.3d 668, ¶¶ 12, 18–19 (Ct. App. 2006) (officer found victim staggering down road with blood in hair and on face; officer asked him what happened, and he said three men had jumped him and had taken his car; victim died before trial; court held, although victim gave answers in response to officer’s question, primary purpose of question was to enable police to meet ongoing emergency and not to prove past events for later criminal prosecution, thus victim’s statement was not “testimonial statement” and admission did not violate confrontation clause).

State v. King, 212 Ariz. 372, 132 P.3d 311, ¶¶ 2–6, 29–32 (Ct. App. 2006) (declarant called 9-1-1 and requested that officers come to her house, said she had restraining order against defendant, who had just thrown two puppies over her house; when operator asked where defendant was, declarant said he “just drove off” and that she did not know where he was; in response to further questions, declarant identified defendant by name, date of birth, clothing, and race, and provided model and color of vehicle; court reversed conviction and stated that, on remand, trial court should consider which portions of 9-1-1 might be admissible and which parts might not be admissible).

803.2.004 Statements made during police interrogation under circumstances objectively indicating that there is no ongoing emergency, and that the primary purpose is to establish or prove past events potentially relevant to later criminal prosecution are testimonial.

State v. Parks, 213 Ariz. 412, 142 P.3d 720, ¶¶ 4–7 (Ct. App. 2006) (police arrived after victim had been killed; after determining that defendant’s son and brother had witnessed shooting, police separated and questioned them; because conduct showed police were operating in investigative mode, statements were testimonial, thus admission violated confrontation clause).

State v. King, 212 Ariz. 372, 132 P.3d 311, ¶¶ 2–6, 29–32 (Ct. App. 2006) (declarant called 9-1-1 and requested that officers come to her house, said she had restraining order against defendant, who had just thrown two puppies over her house; when operator asked where defendant was, declarant said he “just drove off” and that she did not know where he was; in response to further questions, declarant identified defendant by name, date of birth, clothing, and race, and provided model and color of vehicle; court reversed conviction and stated that, on remand, trial court should consider which portions of 9-1-1 might be admissible and which parts might not be admissible).

803.2.006 An excited utterance that **was made** under circumstances that the declarant would reasonably expect to be available at trial will be considered a “testimonial statement” or “testimonial evidence” and thus must satisfy the requirements of the Sixth Amendment.

State v. King, 212 Ariz. 372, 132 P.3d 311, ¶¶ 33–35 (Ct. App. 2006) (after declarant made 9-1-1 call, officer arrived and questioned declarant about what had happened; court held declarant would have

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expected these statements would be used in investigation and prosecution of defendant, thus statements were “testimonial evidence”).

State v. Parks, 211 Ariz. 19, 116 P.3d 631, ¶¶ 36–53 (Ct. App. 2005) (defendant’s son witnessed actions that killed victim; officer interviewed son, who was emotional at time; son died before trial; court held son’s statement was as excited utterance; court further held son’s statement was “testimonial statement” because: (1) officer knew defendant had killed victim prior to interview; (2) defendant had already been arrested; (3) there were no exigent safety, security, or medical concerns; (4) officer’s questioning was not casual encounter; (5) officer separated son and other witness before questioning; (6) officer was in investigative mode; (7) purpose of questioning was to obtain information about potential crime; and (8) son appeared to appreciate that what he had witnessed would have significance to future criminal prosecution; court held admission of son’s statement violated defendant confrontation clause), *aff’d*, 213 Ariz. 412, 142 P.3d 720, ¶ 8 (Ct. App. 2006).

803.2.007 An excited utterance that **was not made** under circumstances that the declarant would reasonably expect to be available at trial will not be considered a “testimonial statement” or “testimonial evidence” and thus its admissibility will be controlled by the rules governing hearsay statements.

State v. Alvarez, 213 Ariz. 467, 143 P.3d 668, ¶¶ 16–17 (Ct. App. 2006) (officer found victim with blood on face and hair; officer asked him what happened, and he said three men had jumped him and had taken car; victim died before trial; court held, although victim gave answers in response to officer’s question, there was nothing to suggest victim would have reasonably expected his statement to be used in later criminal prosecution, thus statement was not testimonial and admission did not violate confrontation clause).

State v. Aguilar, 210 Ariz. 51, 107 P.3d 377, ¶¶ 2–13 (Ct. App. 2005) (in prosecution for murder, state sought to admit testimony by victim’s son of excited utterance made by victim, and testimony by victim’s wife’s brother-in-law of excited utterance made by victim’s wife; court held in-court testimony by lay witness of out-of-court excited utterances that lay witness heard was not “testimonial statement” that must satisfy Sixth Amendment).

State v. Alvarez, 210 Ariz. 24, 107 P.3d 350, ¶¶ 18–22 (Ct. App. 2005) (officer found victim with blood on face and hair; officer asked victim what happened, and victim said three men jumped him and took his car; victim died before trial; court held, although victim gave answers in response to officer’s questions, this was not “police interrogation”: victim did not call police, but rather officer had found him; officer did not know that crime had been committed, but rather was questioned him about injuries in order to obtain medical help for him; questioning was neither structured nor conducted for purpose of producing evidence in anticipation of potential criminal prosecution, thus was not “testimonial statement”), *vac’d*, 213 Ariz. 467, 143 P.3d 668, ¶ 2 (Ct. App. 2006).

803.2.010 This rule has three requirements: (1) there must be a startling event; (2) the statement must relate to the startling event; and (3) the statement must be made soon enough after the event so that the declarant does not have time to fabricate.

State v. Steinle (Moran), 239 Ariz. 415, 372 P.3d 939, ¶¶ 21–23 (2016) (state intended to use cell-phone video recording of fight; defendant contended video contained multiple levels of hearsay, including conduct and people making statements heard on video; court noted that, to extent persons could be heard making statements, those would qualify as present sense impressions or excited utterances).

State v. Payne, 233 Ariz. 484, 314 P.3d 1239, ¶¶ 46–50 (2013) (defendant sought to introduce codefendant’s threats to “kill” children if defendant did not do something about their behavior; trial court did not abuse discretion in determining that statement was not excited utterance).

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State v. Hausner, 230 Ariz. 60, 280 P.3d 604, ¶¶ 64–65 (2012) (officer was one of first to arrive a scene of shooting; victim described where he was standing and vehicle from where shot was fired; court held statement met three necessary requirements).

State v. Hausner, 230 Ariz. 60, 280 P.3d 604, ¶¶ 66–67 (2012) (officer was one of first to arrive a scene of shooting; victim said he was in much pain and described vehicle from where shot was fired; court held statement was excited utterance).

State v. Bass, 198 Ariz. 571, 12 P.3d 796, ¶¶ 20–29 (2000) (defendant drove above speed limit when vehicle in left lane moved partially into right lane, whereupon defendant swerved right and vehicle's right wheels rode curb for moment, until passenger grabbed steering wheel and jerked it to left, which caused defendant to lose control of vehicle, which then spun across center line and into incoming traffic, causing multi-car collision and death and injuries to others; declarant stopped and made statement about defendant's speed to driver of vehicle that had moved toward right lane; court stated either high rate of speed or accident itself could have been startling event, but hearsay statement related only to speed defendant was traveling, and because there was no evidence showing speed defendant was traveling was startling event, there was insufficient basis to admit hearsay testimony, and thus reversed conviction).

State v. Guley, 240 Ariz. 580, 382 P.3d 795, ¶¶ 17–19 (Ct. App. 2016) (M.W. testified about what S.W. had said; defendant contended S.W.'s statements were hearsay; court noted defendant's assault on S.W.'s mother startled S.W., that S.W. was extremely tense and hyper when he described incident, and only 5 to 10 minutes elapsed between events and S.W.'s statement, thus S.W.'s statements were excited utterances).

State v. Alvarez, 210 Ariz. 24, 107 P.3d 350, ¶¶ 13–17 (Ct. App. 2005) (officer found victim with blood on face and hair; officer asked victim what happened, and victim said three men had jumped him and had taken his car; victim died before trial; court held that victim was under stress of startling event and that statement related to startling event, thus it qualified as excited utterance; any issues of reliability went to weight of evidence, not admissibility), *vac'd*, 213 Ariz. 467, 143 P.3d 668, ¶ 2 (Ct. App. 2006).

State v. Beasley, 205 Ariz. 334, 70 P.3d 463, ¶¶ 28–31 (Ct. App. 2003) (trial court admitted following statement made 30 minutes after shooting: "I got shot for no reason, but I don't want to sue; I just want this to be over").

State v. Taylor, 196 Ariz. 584, 2 P.3d 674, ¶¶ 18–20 (Ct. App. 1999) (trial court admitted step-mother's testimony of what victim said to her about the alleged sexual assault 45 minutes after incident; because victim was still screaming, yelling, and crying when she made statement, trial court did not err in admitting statement).

803.2.020 A statement does not have to be contemporaneous with the startling event, but may be made after a lapse of time as long as the declarant is under the effect of the event.

State v. Beasley, 205 Ariz. 334, 70 P.3d 463, ¶¶ 28–31 (Ct. App. 2003) (trial court admitted following statement: "I got shot for no reason, but I don't want to sue; I just want this to be over"; although declarant made statement 30 minutes after shooting, and although declarant was less excited that he was at time of shooting, record showed he was still excited, thus trial court did not abuse discretion in admitting it).

State v. Taylor, 196 Ariz. 584, 2 P.3d 674, ¶¶ 18–20 (Ct. App. 1999) (trial court admitted step-mother's testimony of what victim said to her about the alleged sexual assault 45 minutes after the incident; because victim was still screaming, yelling, and crying when she made statement, trial court did not err in admitting statement).

HEARSAY

803.2.030 A statement is inadmissible if the declarant had enough time to fabricate.

State v. Cruz, 218 Ariz. 149, 181 P.3d 196, ¶¶ 52–56 (2008) (paramedic remained with defendant until 1 hour after shooting; on way to hospital, defendant told paramedic “Arturo Sandoval” had shot officer; although shooting of officer was startling event and words spoken related to that startling event, trial court concluded defendant had ample opportunity for conscious reflection and had so reflected; thus court concluded trial court did not abuse discretion in excluding statement).

803.2.060 An excited utterance qualifies as a firmly rooted hearsay exception, and generally any evidence that falls within such an exception for that reason alone would satisfy the reliability requirement of the confrontation clause.

Paragraph (3) — Then existing mental, emotional, or physical condition.

803.3.010 This exception allows the introduction of evidence showing the declarant’s then existing state of mind.

State v. Huerstel, 206 Ariz. 93, 75 P.3d 698, ¶¶ 66–68 (2003) (defendant was charged with robbing Pizza Hut; court held that defendant’s statement he made a few days prior to that robbery that he intended to rob Auto Zone was statement of plan or intent).

State v. Pandeli, 200 Ariz. 365, 26 P.3d 1136, ¶¶ 24–25 (2001) (because defendant’s statement 2 days after killing that he felt threatened by victim described his prior mental state and not his then existing state of mind, it did not qualify under this exception).

State v. Fulminante, 193 Ariz. 485, 975 P.2d 75, ¶¶ 44–48 (1999) (declarant’s statement showing fear of another is admissible to show declarant’s later conduct).

803.3.015 The rationale for this hearsay exception rests on two assumptions: (1) declarant’s statements have special reliability due to spontaneity and probable sincerity; and (2) because declarant’s knowledge of his or her state of mind is inherently superior to any external, circumstantial account, there is a “fair necessity” to use those statements.

State v. Fulminante, 193 Ariz. 485, 975 P.2d 75, ¶ 31 (1999) (court reversed conviction because trial court admitted not just state-of-mind evidence, it also allowed admission of statements of memory or belief).

803.3.020 The purpose of this exception is to allow introduction of evidence to show that the declarant acted in accordance with the declarant’s stated intention, that is, to prove the declarant’s future conduct, not the future conduct of another person, although statements having some bearing on the conduct and whereabouts of another are nonetheless admissible if they relate primarily to the declarant’s state of mind.

Keith Equip. v. Casa Grande Cotton Fin., 187 Ariz. 259, 928 P.2d 683 (Ct. App. 1996) (appellee claimed hearsay statement was admissible to show state of mind of person who heard statement; court held listener’s state of mind was not relevant, thus trial court erred in admitting statement).

803.3.025 To be admissible under this exception, the declarant’s statement must be relevant to prove the declarant’s state of mind.

State v. Hoskins, 199 Ariz. 127, 14 P.3d 977, ¶¶ 59–63 (2001) (defendant asserted he told sister that unknown person named “Paul” gave him gun used in murder and that sister told witness about this, and claimed he should have been allowed to cross-examine witness about these conversations because it would have shown witness’s state of mind that he was aware of defendant’s claims about “Paul”; court held these were self-serving hearsay statements unrelated to witness’s state of mind).

State v. Fulminante, 193 Ariz. 485, 975 P.2d 75, ¶ 33 (1999) (declarant-victim’s statements showed she was afraid of defendant).

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803.3.030 To be admissible under this exception, the declarant's state of mind must be relevant to some issue in the proceedings.

State v. Huerstel, 206 Ariz. 93, 75 P.3d 698, ¶¶ 69–70 (2003) (defendant was charged with robbing Pizza Hut; court held defendant's statement he made a few days prior to that robbery that he intended to rob Auto Zone was statement of plan or intent; defendant contended statement was inadmissible because his intent was not an issue; court held that, because defendant never raised that intent issue with trial court, defendant waived that argument on appeal).

State v. Fulminante, 193 Ariz. 485, 975 P.2d 75, ¶ 34 (1999) (declarant-victim's statements showed she was afraid of defendant and that she disliked him, which would have shown defendant had a motive to kill victim and would refute defendant's claim that he had a good relationship with victim).

State v. Supinger, 190 Ariz. 326, 947 P.2d 900 (Ct. App. 1997) (officer's testimony that victim's mother said she did not believe victim was hearsay, but was admissible because it showed mother's state of mind, and that state of mind was relevant because this lack of parental support might explain victim's later recantation of the molestation).

803.3.035 The state is permitted to introduce a statement showing declarant's state of mind to show the defendant's motive; not just to refute the defendant's claim of a lack of motive.

State v. Fulminante, 193 Ariz. 485, 975 P.2d 75, ¶ 35 (1999) (declarant-victim's statements showed she was afraid of defendant and that she disliked him, which would have shown defendant had a motive to kill victim).

803.3.040 A statement showing the declarant intended to do some act is admissible.

State v. Huerstel, 206 Ariz. 93, 75 P.3d 698, ¶¶ 69–70 (2003) (defendant was charged with robbing Pizza Hut; court held that defendant's statement he made a few days prior to that robbery that he intended to rob Auto Zone was statement of plan or intent).

803.3.050 This rule does not allow the admission of a statement of memory or belief, and must not include a description of the factual occurrence that produced the state of mind.

State v. Pandeli, 200 Ariz. 365, 26 P.3d 1136, ¶¶ 24–26 (2001) (defendant said he and victim disrobed in back of the van, that he became angry when he could not perform sexually and victim refused to return money, that she pulled knife and he took it from her, and that he excised breast parts because of his anger; because this statement described neither present feeling nor future intent, and was instead asserted memory of past events, trial court properly precluded admission of statement as not satisfying requirements of this exception).

State v. Hoskins, 199 Ariz. 127, 14 P.3d 977, ¶¶ 59–63 (2001) (defendant asserted he told sister that unknown person named "Paul" gave him gun used in murder and that sister told witness about this, and claimed he should have been allowed to cross-examine witness about these conversations because it would have shown witness's state of mind that he was aware of defendant's claims about "Paul"; court held these were self-serving hearsay statements unrelated to witness's state of mind).

State v. Fulminante, 193 Ariz. 485, 975 P.2d 75, ¶ 41 (1999) (statements, "He's going to kill me," and "I'm afraid he's going to kill me," are statements of belief and not admissible).

State v. Fulminante, 193 Ariz. 485, 975 P.2d 75, ¶ 41 (1999) (victim's statement about conversation she heard between her mother and defendant was statement of victim's memory, and should not have been admitted).

HEARSAY

Paragraph (4) — Statements for purposes of medical diagnosis or treatment.

803.4.010 To be admissible under this exception, (1) the declarant's motive for giving the statement must be consistent with receiving medical care, and (2) the information must be of the type upon which a physician would rely for diagnosis or treatment.

State v. Robinson, 153 Ariz. 191, 199, 735 P.2d 801, 809 (1987) (5-year-old victim made statements to her treating psychologist; nothing in record indicated victim's motive for making statements was other than for purpose of receiving medical care, and information concerning cause of injuries was critical to effective diagnosis and treatment).

State v. Jeffers, 135 Ariz. 404, 661 P.2d 1105 (1983) (declarant's identification of who administered narcotic not reasonably pertinent to treatment, and refusal to identify narcotic showed ability to fabricate, thus reducing reliability; trial court should not have admitted statement).

State v. Lopez, 217 Ariz. 433, 175 P.3d 682, ¶¶ 3, 8–13 (Ct. App. 2008) (witness was registered nurse, certified inpatient obstetrics nurse, forensic nurse, and sexual assault nurse examiner; nurse testified about victim's description of attacker's physical contact with her, and about answers victim gave to questions included in sexual assault kit provided by TPD; court held victim's apparent motive in making statements was to receive medical care, and that it was reasonable for physician to rely on that information for diagnosis or treatment, thus statements qualified as hearsay exceptions).

803.4.015 If (1) the declarant's motive for giving the statement is consistent with receiving medical care, and (2) the information is of the type upon which a physician would rely for diagnosis or treatment, the statements qualify as a hearsay exception even if the statements were answers given in response to questions included in a sexual assault kit provided by the police.

State v. Lopez, 217 Ariz. 433, 175 P.3d 682, ¶¶ 8–14 (Ct. App. 2008) (nurse testified about victim's description of attacker's physical contact with her, and about answers victim gave to questions included in sexual assault kit provided by TPD; court held victim's apparent motive in making statements was to receive medical care, and that it was reasonable for physician to rely on that information for diagnosis or treatment; court stated that, mere fact that questions might be asked routinely in sexual assault cases did not necessarily determine their admissibility as hearsay exceptions).

803.4.020 If the identity of the person who caused the injuries is relevant to proper diagnosis and treatment, then the declarant's statement of who caused the injuries is admissible.

State v. Robinson, 153 Ariz. 191, 200, 735 P.2d 801, 810 (1987) (court held that, because exact nature and extent of psychological problems that ensue from child sexual abuse often depend on identity of abuser, statement of abuser's identity was admissible, thus trial court properly allowed treating psychologist to testify that 5-year-old victim said defendant had engaged in acts of molestation).

State v. Jones, 188 Ariz. 534, 541, 937 P.2d 1182, 1189 (Ct. App. 1996) (defendant was charged with sexually abusing daughter over 10-year period when victim was from age 4 to age 14; when physician examined victim 2 weeks after she reported incidents to police, victim was reluctant to discuss details of sexual assaults, so victim wrote note in response to question of what happened; physician indicated that questions asked of victim were routine in sex abuse cases; court held that contents of note were reasonably pertinent to diagnosis and treatment, thus trial court properly admitted note stating father had molested her).

State v. Sullivan, 187 Ariz. 599, 601–02, 931 P.2d 1109, 1111–12 (Ct. App. 1996) (defendant charged with causing physical injuries (cigarette burns) to 2-year-old victim; court held that, because prevention of further abuse and facilitation of recovery apply in cases of physical abuse the same as in cases of sexual abuse, victim's statement identifying person who caused injuries would qualify as statement made for diagnosis and treatment, thus trial court properly allowed pediatrician to testify that victim said defendant caused burns on his leg).

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803.4.030 If the identity of the person who caused the injuries is not relevant to proper diagnosis and treatment, then the declarant's statement of who caused the injuries is not admissible.

State v. Jeffers, 135 Ariz. 404, 418, 420–21, 661 P.2d 1105, 1119, 1121–22 (1983) (on previous occasion, victim was taken to hospital, where nurse determined victim had injuries to hand and leg, and showed symptoms of drug intoxication; nurse testified that, in response to question of what happened, victim said defendant had drugged her, that friends were coming to help kill her, and that she jumped from window to get away; nurse testified that identity of person who administered narcotic drug was not reasonably pertinent to diagnosis or treatment, thus trial court erred in admitting statement identifying defendant as person who gave drugs to victim).

State v. Reidhead, 146 Ariz. 314, 315–16, 705 P.2d 1365, 1366–67 (Ct. App. 1985) (defendant was charged with child (physical) abuse committed on his 4-year-old son; court held that identity of person who caused injury not reasonably pertinent to diagnosis or treatment, thus held that trial court erred in allowing treating physician to testify that victim said “daddy twisted my arm”). (Note: It appears the Arizona Supreme Court implicitly overruled *Reidhead* because (1) dissent was of opinion that identity of person who caused injury was reasonably pertinent to diagnosis or treatment, thus trial court properly allowed hearsay statement identifying person who caused injury, and (2) Arizona Supreme Court cited with approval that dissent in *State v. Robinson*, 153 Ariz. at 199, 735 P.2d at 809.)

State v. Lopez, 217 Ariz. 433, 175 P.3d 682, ¶¶ 12 & n.2 (Ct. App. 2008) (nurse testified that victim told her that defendant pulled her shirt over her head so she was unable to see her attacker; assuming this statement was not relevant to medical treatment, any error was harmless because victim testified at trial and told same thing to jurors).

803.4.040 Statements of a victim of a sexual assault made to a psychiatrist, psychologist, or counselor in the course of treatment resulting from the assault are admissible.

State v. Robinson, 153 Ariz. 191, 199, 735 P.2d 801, 809 (1987) (trial court properly allowed treating psychologist to testify that 5-year-old victim said defendant had engaged in acts of molestation).

State v. Rushton, 172 Ariz. 454, 456, 837 P.2d 1189, 1191 (Ct. App. 1992) (trial court properly admitted victim's statements to social worker during mental health treatments and counseling).

803.4.050 The person receiving the statements of a victim of a sexual assault does not have to be a licensed or certified counselor or physician as long as the statements were made in the course of treatment and counseling that was a result of the assault.

State v. Lopez, 217 Ariz. 433, 175 P.3d 682, ¶¶ 15–16 (Ct. App. 2008) (nurse testified about victim's description of attacker's physical contact with her, and about answers victim gave to questions included in sexual assault kit provided by TPD; defendant contended statements did not qualify as hearsay exception because they were never forwarded to physician; court noted that nurse provided treatment, thus it did not matter if no physician was involved).

State v. Rushton, 172 Ariz. 454, 457, 837 P.2d 1189, 1192 (Ct. App. 1992) (although social worker was not licensed or certified, she was authorized to counsel victims of sexual assaults).

Paragraph (5) — Recorded recollection.

803.5.005 In order to be admissible under this exception, the requirements are: (1) the declarant (a) once had knowledge of the event, (b) now has insufficient recollection to testify fully and accurately, and (c) made or adopted the statement when the matter was fresh in the declarant's memory; and (2) the statement correctly reflects the declarant's knowledge.

HEARSAY

State v. Smith, 215 Ariz. 221, 159 P.3d 531, ¶¶ 29–30 (2007) (detective testified he (a) wrote his report while medical examiner was performing autopsy, (b) wrote in report what medical examiner said during autopsy, (c) reviewed report for accuracy, (d) adopted report by signing it, and (e) now had insufficient recollection of details of autopsy; report was thus admissible as recorded recollection).

State v. Martin, 225 Ariz. 162, 235 P.3d 1045, ¶ 12 (Ct. App. 2010) (after alleged molestations, forensic specialist conducted videotaped forensic interview of 5-year-old victim; victim testified at trial, and could remember details of one incident; for other incident, victim testified she could not remember it, but she remembered talking to “a lady” to whom she told “the truth” at time when she could better remember “some other stuff that happened with [Defendant],” and detective testified videotape accurately reflected forensic interview he observed; court held this met foundational requirements of rule).

Goy v. Jones (State), 205 Ariz. 421, 72 P.3d 351, ¶¶ 4–12 (Ct. App. 2003) (court held that, if police officer and police officer’s report meet requirements of Rule 803(5), report is admissible, but only to extent report may be read in evidence).

803.5.007 When a witness testifies and is subject to cross-examination, any statement that witness made is admissible and its admission does not violate the confrontation clause.

Crawford v. Washington, 541 U.S. 36, 59, 124 S. Ct. 1354, 1369 n.9 (2004) (Court stated, “[W]hen the declarant appears for cross-examination at trial, the confrontation clause places no constraints at all on the use of his prior testimonial statements.”).

State v. Martin, 225 Ariz. 162, 235 P.3d 1045, ¶¶ 16–20 (Ct. App. 2010) (after alleged molestations, forensic specialist conducted videotaped interview of 5-year-old victim; victim testified at trial and could not remember details of one incident, so trial court played videotape; defendant contended interviewer’s statements in videotape were testimonial, and because interviewer did not testify, that violated his right to confront witnesses; court noted interviewer only asked questions and at times requested clarification, but did not repeat statements made by others or recount any other information that might have implicated defendant, thus what interviewer said was not testimonial; court held no violation of right of confrontation).

State v. Salazar, 216 Ariz. 316, 166 P.3d 107, ¶¶ 3–8 (Ct. App. 2007) (when victim testified she did not remember or could not recall, prosecutor played her tape recorded statement to police; because victim was present and subject to cross-examination, admission of her out-of-court statement did not violate confrontation clause).

State v. Real, 214 Ariz. 232, 150 P.3d 805, ¶¶ 2–9 (Ct. App. 2007) (officer administered FSTs to defendant and then took his statement; at trial, officer had no independent memory of investigation, so trial court allowed officer to read from his report; court held that, because officer testified and was subject to cross-examination, admission officer’s testimony did not violate Sixth Amendment).

803.5.013 There is no requirement that the memorandum be made by or at the direction of the declarant; what is necessary is that the declarant (1) once had knowledge of the event, (2) now has insufficient recollection to testify fully and accurately, and (3) made or adopted the statement when fresh in the declarant’s memory, and if the declarant did not make or adopt the memorandum, that the person who did make the memorandum made an accurate account of what the declarant said.

State v. Alatorre, 191 Ariz. 208, 953 P.2d 1261, ¶ 10 (Ct. App. 1998) (8-year-old victim testified she remembered events more clearly when she spoke to detective than she did at time of trial and her memory had since diminished, and that she spoke truthfully to detective and told him everything she remembered at time; detective testified that tape-recording was accurate recording of victim’s statement and that transcript of recording was accurate as well; trial court properly admitted victim’s recorded statements).

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803.5.015 This exception allows for admission of jointly constructed records (one person makes an oral statement, another writes it down) as long as each person in the chain testifies to performing his or her role accurately, or the record permits an inference that the person performed his or her role accurately.

* *State v. Giannotta*, 248 Ariz. 82, 456 P.3d 1256, ¶¶ 11–19 (Ct. App. 2019) (victim purchased new AR-15 semi-automatic rifle; victim met defendant and showed him rifle, which was in trunk; victim went to passenger compartment to look for his phone, and when he turned back, rifle was no longer in trunk and defendant was getting in his car to drive away; victim was unable to follow defendant, so he went home to retrieve his receipt, which listed rifle's serial number, and then called police to report theft; officer later called victim that day to take formal report, at which point victim provided rifle's serial number; victim testified at trial but did not recall rifle's serial number, and instead described reading serial number to police officer who made formal report; when that officer testified, he recited serial number based on his written report documenting number victim gave him; although victim did not expressly testify he recited serial number accurately, circumstances permitted inference of accuracy; although officer did not expressly avow that he recorded number accurately, his testimony allowed inference of accuracy; accordingly, serial number as reflected in officer's report was admissible as jointly constructed recorded recollection created by victim and officer).

803.5.016 In order to refresh a witness's recollection with a recording, the witness should listen to the recording outside of the presence of the jurors; if the witness's recollection is refreshed, the witness may then testify; if the witness's recollection is not refreshed, the party may then seek to have the recording admitted under Rule 803(5).

State v. Salazar, 216 Ariz. 316, 166 P.3d 107, ¶¶ 8 & n.2 (Ct. App. 2007) (when victim testified she did not remember or could not recall, prosecutor played her tape recorded statement; to extent trial court allowed tape to be played to jurors, trial court erred, but because recorded statement impeached her testimony, any error in playing of recording was harmless).

803.5.017 If a memorandum or record is admissible under this rule, the memorandum or record may be read in evidence, but the memorandum or record may not itself be received as an exhibit unless the adverse party offers it.

State v. Martin, 225 Ariz. 162, 235 P.3d 1045, ¶¶ 13–15 (Ct. App. 2010) (trial court ruled videotape of interview of 5-year-old victim was recorded recollection and played it to jurors during trial over defendant's objection; in response to question from jurors, parties agreed jurors would be able to review videotape during deliberations; on appeal, defendant contended trial court erred in allowing videotape to be admitted in evidence so it was available to jurors during deliberations; because defendant did not object at trial, court reviewed for fundamental error only; court held defendant failed to prove jurors reviewed videotape during deliberations, and further held that, even if jurors did view videotape during deliberations, other evidence supported his conviction, thus defendant failed to establish prejudice).

State v. Ortega, 220 Ariz. 320, 206 P.3d 769, ¶¶ 30–33 (Ct. App. 2008) (victim's brother saw defendant molest victim; when called to testify, brother did not remember many details of events or his statements to police detective; trial court properly allowed state to read to brother excerpts from his interview with police, whereupon he remembered telling detective that defendant threatened him if he told anyone what had happened).

Goy v. Jones, 205 Ariz. 421, 72 P.3d 351, ¶¶ 4–12 (Ct. App. 2003) (court held that, if police officer and police officer's report meet the requirements of Rule 803(5), report is admissible, but only to extent report may be read in evidence; court noted that Rule 803(8) would preclude admission of report itself, but that Rule 803(5) allows admission of report if opposing party offers it in evidence).

HEARSAY

803.5.040 This rule is not limited to written materials, thus a videotape may qualify as a recorded recollection.

State v. Martin, 225 Ariz. 162, 235 P.3d 1045, ¶¶ 10–11 (Ct. App. 2010) (after alleged molestations, forensic specialist conducted videotaped forensic interview of 5-year-old victim; victim testified at trial, and could remember details of one incident but not of other incident; trial court played for jurors videotaped interview where victim described other incident; court rejected defendant's contention that Rule 803(5) is limited to written material).

Paragraph (6) — Records of regularly conducted activity.

803.6.005 Because business record are generally created for the purpose of the administration of the entity's affairs and not for the purpose of proving some fact at trial, business records ordinarily are not testimonial evidence, thus their admission does not violate confrontation clause.

State v. Medina, 232 Ariz. 391, 306 P.3d 48, ¶¶ 51–64 (2013) (Dr. B. conducted autopsy and prepared autopsy report, but did not testify at trial; Dr. K. was trial witness and testified about report's conclusions and used report and photographs of body to make various independent conclusions about death; because autopsy was conducted day after killing, which was before defendant became suspect, and report's purpose was not primarily to accuse specific individual, autopsy report was not testimonial, thus admission of autopsy report did not violate defendant's right of confrontation; court further held Dr. K.'s testimony did not violate defendant's right of confrontation).

State v. Parker, 231 Ariz. 391, 296 P.3d 54, ¶¶ 38–41 (2013) (even though bank's fraud investigator prepared report at request of police, fraud investigator prepared report by copying and pasting victims' credit card information from bank's database, thus report contained information bank regularly collected in database, and defendant was able to cross-examine fraud investigator, so report was not testimonial evidence).

State v. Parker, 231 Ariz. 391, 296 P.3d 54, ¶ 42 (2013) (victim prepared time sheets as part of routine business practice and not to aid police investigation, thus time sheets were not testimonial evidence).

803.6.010 This exception allows for admission of a memorandum, report, record, or data compilation if made at or near the time of the underlying event.

State v. Dickens, 187 Ariz. 1, 926 P.2d 468 (1996) (because report of theft was made 2 months after theft, which was not customary, and was not on business's official incident report form, it did not qualify as business record).

- * *State v. Griffith*, 247 Ariz. 361, 449 P.3d 353, ¶¶ 5–10 (Ct. App. 2019) (victims returned home and found it had been burglarized, noting three Apple iPads were missing; based on information victims acquired from Apple, police subpoenaed Apple and obtained information about subject named Brandon Griffith; using police database, officers found a Brandon Griffith with same address as one Apple provided; police then interviewed Griffith, who explained that others frequently brought him computer devices asking him to restore devices to their factory settings, and admitted performing this service even when he suspected devices were stolen; Griffith faintly recalled that suspect in police's burglary investigation had once brought him several devices to reset, including three iPads; Griffith said he communicated with suspect through Facebook, prompting the police to obtain search warrant for Griffith's Facebook account; in response, Facebook produced, among other things, message containing photograph sent from Griffith's account and log of account's search history; when state sought to introduce Facebook documents as business records at trial, Griffith objected that they were inadmissible hearsay because state failed to provide certification or testimony required to admit them under Rule 803(6) (business records exception), or under Rule 902(11) (self-authentication if proper certification provided); court held state failed to satisfy requirement that statement was made at or near time by someone with first-hand knowledge).

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Bohsancurt v. Eisenberg, 212 Ariz. 182, 129 P.3d 471, ¶ 17 (Ct. App. 2006) (technician who conducted calibration checks on Intoxilyzer 5000 recorded results at or near time of tests).

Standard Chart. PLC v. Price Waterhouse, 190 Ariz. 6, 945 P.2d 317 (Ct. App. 1996) (defendant sought to introduce December memorandum of conversations; some testimony indicated conversation took place in summer or fall, while other testimony indicated it took place in May; trial court did not abuse discretion in concluding memorandum was not made at or near time of conversations).

803.6.020 This exception allows for admission of a memorandum, report, record, or data compilation if the information is either compiled or transmitted by someone with firsthand knowledge.

State v. Parker, 231 Ariz. 391, 296 P.3d 54, ¶¶ 34–37 (2013) (in order to impeach defendant’s testimony about when he left spot of blood in victim’s kitchen; state used victim’s co-worker to introduce victim’s time sheets; although co-worker did not see victim write on time sheet on day in question, he testified he was familiar with victim’s handwriting, which was sufficient to establish victim made entry, and further testified victim recorded work hours close to time he performed work).

- * *State v. Griffith*, 247 Ariz. 361, 449 P.3d 353, ¶¶ 5–10 (Ct. App. 2019) (victims found home had been burglarized and three Apple iPads were missing; based on information victims acquired from Apple, police subpoenaed Apple and obtained information about subject named Brandon Griffith; using police database, officers found a Brandon Griffith with same address as one Apple provided; police then interviewed Griffith, who explained that others frequently brought him computer devices asking him to restore devices to their factory settings, and admitted performing this service even when he suspected devices were stolen; Griffith recalled that suspect in police’s burglary investigation had once brought him several devices to reset, including three iPads; Griffith said he communicated with suspect through Facebook, prompting the police to obtain search warrant for Griffith’s Facebook account; in response, Facebook produced, among other things, message containing photograph sent from Griffith’s account and log of account’s search history; when state sought to introduce Facebook documents as business records at trial, Griffith objected that they were inadmissible hearsay because state failed to provide certification or testimony required to admit them under Rule 803(6) (business records exception), or under Rule 902(11) (self-authentication if proper certification provided); court held state failed to satisfy requirement that statement was made at or near time by someone with first-hand knowledge).

State v. McCurdy, 216 Ariz. 567, 169 P.3d 931, ¶ 12 (Ct. App. 2007) (trial court admitted “Inmate Personal Property Receipt” for defendant; defendant claimed records were inadmissible because former jail supervisor testified only that “booker” was “Mr. Kent”; jail supervisor testified about booking process and how such receipts were created in normal course of business at jail, and who bookers were and how they processed inmates; court concluded trial court did not abuse discretion in finding jail supervisor provided sufficient information for admission of business records).

803.6.030 Records must contain information from a person who acquired firsthand knowledge in the course of a regularly conducted business activity, and as long as the testimony shows that it was the regular practice of the enterprise to get information from such persons, there is no need that the persons with the firsthand knowledge be identified.

State v. Parker, 231 Ariz. 391, 296 P.3d 54, ¶ 33 (2013) (at officer’s request, bank’s fraud investigator prepared report by copying victims’ credit card information from bank’s database; because bank regularly relied on information in database, it did not matter that bank’s fraud investigator did not know who transmitted information contain in data bank).

State v. McGann, 132 Ariz. 296, 645 P.2d 811 (1982) (customers’ statements, contained in Chevron’s business records, that someone had forged their names was information customers did not acquire in course of their business activities and thus were inadmissible).

HEARSAY

State v. Petzoldt, 172 Ariz. 272, 836 P.2d 982 (Ct. App. 1991) (witness testified persons in drug organization made notations of drug deals in certain notebooks, but did not identify these persons).

Transamerica Ins. Co. v. Trout, 145 Ariz. 355, 701 P.2d 851 (Ct. App. 1985) (because an appraiser with no relation to witness prepared report, fact that witness kept report with his business records did not make it admissible as a business record because witness did not acquire information in report through witness's own regularly conducted business activities, and could give no testimony on how exactly report was made).

803.6.040 This allows for admission of a memorandum, report, record, or data compilation if made and kept entirely in the course of a regularly conducted business activity.

State v. Dickens, 187 Ariz. 1, 926 P.2d 468 (1996) (because report of theft was made 2 months after theft, which was not customary, and was not on business's official incident report form, it did not qualify as a business record).

Bobsancurt v. Eisenberg, 212 Ariz. 182, 129 P.3d 471, ¶ 17 (Ct. App. 2006) (regulation required that each Intoxilyzer 5000 undergo calibration checks every 31 days and that person doing calibration and maintenance test complete affidavit listing results of tests).

Taeger v. Catholic Fam. & Com. Serv., 196 Ariz. 285, 995 P.2d 721, ¶ 43 (Ct. App. 1999) (because plaintiffs established only they received documents in course of litigation, this was not sufficient to establish they were made and kept in course of a regularly conducted business).

803.6.045 Although documents prepared solely for purpose of litigation generally are not made in the regular course of business, if documents for litigation are mere reproductions of regularly kept records, such documents may qualify as business records.

State v. Parker, 231 Ariz. 391, 296 P.3d 54, ¶¶ 29–32 (2013) (at request of police, bank's fraud investigator prepared report by copying and pasting victims' credit card information from bank's database; court held trial court did not abuse discretion in admitting report).

803.6.050 This allows for admission of a memorandum, report, record, or data compilation if made and kept pursuant to a regular practice of the business activity, and the party may establish that the entity has adopted certain procedures by means of either a live witness or the business record itself.

Fuenning v. Superior Ct., 139 Ariz. 590, 680 P.2d 121 (1983) (party may use business records to establish that Department of Health Services has adopted certain testing procedures for intoxilyzer tests).

State v. Petzoldt, 172 Ariz. 272, 836 P.2d 982 (Ct. App. 1991) (requirement is only that keeping records is regular practice, not that the records themselves have to be uniform).

803.6.060 For records to be admissible under this exception, the requirements of this rule must be shown by testimony of the custodian of records or another qualified witness, who need not be an employee of the entity that prepared them.

State v. McCurdy, 216 Ariz. 567, 169 P.3d 931, ¶¶ 5–10 (Ct. App. 2007) (as part of proof of defendant's prior conviction, trial court admitted "Inmate Personal Property Receipt" for defendant; former jail supervisor testified about booking process and how such receipts were created in normal course of business at jail; court concluded trial court did not abuse discretion in finding jail supervisor was qualified witness for business records purpose).

Bobsancurt v. Eisenberg, 212 Ariz. 182, 129 P.3d 471, ¶ 17 (Ct. App. 2006) (affidavit listing results of calibration checks was made by person doing calibration and maintenance tests).

Taeger v. Catholic Fam. & Com. Serv., 196 Ariz. 285, 995 P.2d 721, ¶ 41 (Ct. App. 1999) (plaintiffs attempted to establish foundation by testimony of someone who was not defendant's employee, but that person could not testify whether records were kept in regular course of defendant's business).

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803.6.070 If a business record contains a further hearsay statement, the business record is admissible as long as the hearsay statement was made by a person acting in the routine course of the business; if not, the record is not admissible unless the hearsay statement itself is admissible under some exception.

Taegeer v. Catholic Fam. & Com. Serv., 196 Ariz. 285, 995 P.2d 721, ¶ 38 (Ct. App. 1999) (plaintiffs offered in evidence minutes of defendant's board meeting, which contained statements of persons; court noted plaintiffs would have had to show that statements within minutes were either business records themselves, or else satisfied some other hearsay exception).

803.6.080 Because items bought at retail are customarily purchased at the price shown on the price tag, the tag will be considered substantive evidence of the value of the item, without the necessity of introducing testimony establishing the method of preparing the price tag.

State v. Love, 147 Ariz. 567, 711 P.2d 1240 (Ct. App. 1985) (court it would accept price tags as evidence of value unless there was evidence showing they were not reliable measures of value).

803.6.090 Evidence that meets the foundational requirements is subject to exclusion if the source of the information or the method or circumstances of the preparation indicate a lack of trustworthiness, or to the extent that portions of the evidence lack an appropriate foundation.

State v. McCurdy, 216 Ariz. 567, 169 P.3d 931, ¶¶ 9–11 (Ct. App. 2007) (as part of proof of defendant's prior conviction, trial court admitted "Inmate Personal Property Receipt" for defendant; court noted source of identifying information was defendant himself, and so it should be reliable).

State v. King, 213 Ariz. 632, 146 P.3d 1274, ¶¶ 28–31 (Ct. App. 2006) (defendant contended MVD records were not reliable because custodian of records did not know who had retrieved records or level of training of person who had retrieved them, did not know how many people had input access to MVD computers, and did not believe that there was any one person responsible for determining accuracy of records; court noted that custodian of records had been employed at MVD for 17 years and had been custodian of records for 10 years, that she had followed statutory requirements for admission of records, and that she was "100 percent confident" that information in records was accurate; court held trial court did not abuse discretion in admitting MVD records).

Bobsancurt v. Eisenberg, 212 Ariz. 182, 129 P.3d 471, ¶¶ 19–20 (Ct. App. 2006) (defendant contended that affidavit of results of calibration and maintenance tests on Intoxilyzer 5000 was not trustworthy because affidavits were produced by state for state's prosecution of defendant; court noted that maintenance records contain only factual memorializations generated by scientific machine and not opinions of person doing tests, and because person doing testing had no interest in whether information was favorable or adverse to defendant, records were trustworthy).

Larsen v. Decker, 196 Ariz. 239, 995 P.2d 281, ¶¶ 18–26 (Ct. App. 2000) (plaintiff brought action for damages resulting from automobile accident; because plaintiff failed to present evidence that treatment reflected in medical records and bills was for injuries from the automobile accident, trial court properly excluded medical records and bills).

Paragraph (7) — Absence of entry in records kept in accordance with the provisions of paragraph (6).

803.7.010 Evidence that a company has a procedure for reporting certain events, and that there is no record of a certain event is admissible to show that either the event did not happen or it is not of the type required to be reported.

Mohave Elec. Coop. v. Byers, 189 Ariz. 292, 942 P.2d 451 (Ct. App. 1997) (because company required reporting of business expenses, and because there was no stated business purpose for 1,157 credit card transactions, this created factual question that should have precluded summary judgment).

HEARSAY

Paragraph (8) — Public records and reports.

803.8.005 The retention and production of public records is not the type of evil that the confrontation clause intended to avoid, thus public records are not “testimonial evidence.”

State v. Bennett, 216 Ariz. 15, 162 P.3d 654, ¶¶ 1–8 (Ct. App. 2007) (court held affidavit authenticating record of prior conviction was not “testimonial evidence”).

State v. King, 213 Ariz. 632, 146 P.3d 1274, ¶¶ 15–27 (Ct. App. 2006) (court held that record of prior convictions was not “testimonial evidence”).

Bobsancurt v. Eisenberg, 212 Ariz. 182, 129 P.3d 471, ¶¶ 12–18 (Ct. App. 2006) (court held record of calibration and maintenance test of intoxilyzer was not “testimonial evidence”).

803.8.033 This exception allows for admission of records, reports, statements, or data compilations of matters when there is a duty imposed by law to observe and report those matters.

Hudgins v. Southwest Airlines, Co., 221 Ariz. 472, 212 P.3d 810, ¶¶ 25–31 (Ct. App. 2009) (plaintiffs were bail enforcement agents (bounty hunters); before trip from Baltimore to Phoenix, they obtained instructions from Southwest Airlines (SWA) on how to transport handguns lawfully on airplane; plaintiffs followed those instructions, but were arrested because they were not law enforcement officers; plaintiffs sued SWA claiming it was negligent in actions that led to arrest; court held trial court properly admitted FBI reports about this incident drafted by special agent because they reflected matters agent observed or heard and reported pursuant to his FBI duties; court rejected SWA’s claim that these were merely preliminary reports and thus should not have been admitted).

803.8.035 This exception does not allow admission of reports of matters observed by police officers or other law enforcement personnel acting in an adversarial setting.

Goy v. Jones, 205 Ariz. 421, 72 P.3d 351, ¶¶ 4–12 (Ct. App. 2003) (court held that, if police officer and police officer’s report meet the requirements of Rule 803(5), report is admissible, but only to extent report may be read in evidence; court noted that Rule 803(8) would preclude admission of report itself, but that Rule 803(5) allows admission of report if opposing party offers it in evidence).

State v. Meza, 203 Ariz. 50, 50 P.3d 407, ¶ 20 (Ct. App. 2002) (in aggravated assault charged as result of DUI, defendant sought records of all calibration checks and standard quality assurance procedure (“SQAP”) tests performed on Intoxilyzer 5000 unit used for defendant; court held, although information was in possession of Phoenix Police Department Crime Laboratory rather than prosecutor’s office, law enforcement agency investigating criminal action operates as arm of prosecutor for purposes of obtaining information that falls within required disclosure provisions of Rule 15.1, thus state should have disclosed calibration check test results deleted from computer main file).

803.8.040 Although this exception does not allow admission of reports of matters observed by police officers or other law enforcement personnel acting in an adversarial setting, this limitation does not apply to police or law enforcement personnel acting in routine, non-adversarial situations.

Bobsancurt v. Eisenberg, 212 Ariz. 182, 129 P.3d 471, ¶¶ 36–39 (Ct. App. 2006) (report of calibration and maintenance is not result of investigating particular crime and is instead routine task removed from adversarial setting, thus information is not precluded by Rule 803(8)(B)).

State v. Best, 146 Ariz. 1, 3–4, 703 P.2d 548, 550–51 (Ct. App. 1985) (police report stating certain fingerprints came from certain items would be admissible under this exception).

803.8.045 This rule allows for admission of records, reports, statements, or data compilations of factual findings resulting from investigation made pursuant to authority granted by law.

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Shotwell v. Dobahoe, 207 Ariz. 287, 85 P.3d 1045, ¶ 28 (2004) (court rejected claim that EEOC determination letter is automatically admissible in Title VII employment discrimination lawsuit, and held instead admissibility is controlled by Ariz. R. Evid.; court held EEOC letter is admissible hearsay).

Bogard v. Cannon & Wendt Elec. Co., 221 Ariz. 325, 212 P.3d 17, ¶¶ 32–37 (Ct. App. 2009) (court did not follow rule that EEOC determination letter is automatically admissible in Title VII employment discrimination lawsuit, but instead followed rule that trial court has discretion to admit such letter under Ariz. R. Evid.; court held trial court did not abuse discretion in determining EEOC letter was relevant and that its probative value was not substantially outweighed by danger of unfair prejudice).

803.8.050 This exception allows admission of both the factual findings resulting from an investigation and the opinions and conclusions of the investigator as long as they are based on the factual investigation and satisfy the rule's trustworthiness requirement.

Shotwell v. Dobahoe, 207 Ariz. 287, 85 P.3d 1045, ¶¶ 31–32 (2004) (court stated document is not necessarily inadmissible merely because it contains conclusions or is conclusory).

Larsen v. Decker, 196 Ariz. 239, 995 P.2d 281, ¶¶ 9–13, 17 (Ct. App. 2000) (plaintiff brought action for damages resulting from automobile accident; trial court excluded Social Security Administration (SSA) report finding plaintiff permanently disabled because it concluded SSA proceedings were essentially *ex parte*, ALJ was not qualified as medical expert, and none of plaintiff's treating doctors testified, thus report was not sufficiently reliable; court adopted rule that allowed for admission of opinions and conclusions in addition to factual findings in a report, but held trial court properly excluded report based on trial court's conclusion that report was not reliable (trustworthy)).

State ex rel. Miller v. Tucson Assoc. Ltd. Partnership, 165 Ariz. 519, 799 P.2d 860 (Ct. App. 1990) (expressly overrules *Ferguson v. Cessna Aircraft Co.*).

Ferguson v. Cessna Aircraft Co., 132 Ariz. 47, 643 P.2d 1017 (Ct. App. 1981) (expert witness relied upon factual data in report to arrive at his conclusions, but did not rely upon any opinions or conclusions contained in report).

803.8.060 This exception allows admission of the factual findings resulting from an investigation, but does not allow for the admission of the opinions and conclusions of the investigator.

Davis v. Cessna Air. Corp., 182 Ariz. 26, 893 P.2d 26 (Ct. App. 1994) (this appears to be in direct conflict with *State ex rel. Miller v. Tucson Assoc.*, 165 Ariz. 519, 520, 799 P.2d 860, 861 (Ct. App. 1990)).

803.8.070 The trial court may exclude records, reports, statements, or data compilations of public offices or agencies if the sources of information or other circumstances indicate lack of trustworthiness.

Hudgins v. Southwest Airlines, Co., 221 Ariz. 472, 212 P.3d 810, ¶¶ 32–34 (Ct. App. 2009) (plaintiffs were bail enforcement agents (bounty hunters); before trip from Baltimore to Phoenix, they called Southwest Airlines (SWA) to obtain instructions on how to transport handguns lawfully on airplane; plaintiffs followed those instructions, but were arrested in Phoenix because they were not law enforcement officers; plaintiffs sued SWA claiming that SWA was negligent in actions that led to plaintiffs' arrest; trial court did not abuse discretion in concluding FBI reports were trustworthy because (1) they contained relatively straightforward information (customer service agent was on vacation and not available for interview and that messages were left for agent's supervisor), (2) SWA security representative had noted information on SWA form that corroborated reports, (3) FBI agent who prepared reports had no motive to lie, and (4) another FBI agent had approved reports).

803.8.080 As long as the sources of information or other circumstances indicate trustworthiness, any errors or defects in records, reports, statements, or data compilations of public offices or agencies go to the weight and not the admissibility of the documents.

HEARSAY

Hudgins v. Southwest Airlines, Co., 221 Ariz. 472, 212 P.3d 810, ¶ 33 (Ct. App. 2009) (plaintiffs were bail enforcement agents (bounty hunters); on 9/11/99, they flew to Phoenix; before trip, they called Southwest Airlines (SWA) to obtain instructions on how to transport handguns lawfully on airplane; plaintiffs followed those instructions, but were arrested in Phoenix because they were not law enforcement officers; plaintiffs sued SWA claiming that SWA was negligent in actions that led to their arrest; court held, because sources of information and other circumstances indicate trustworthiness of FBI reports, length of time between event and report (nearly 7 weeks), lack of full explanation, misspellings, and ambiguities in reports went to weight and not the admissibility of reports).

Paragraph (18) — Statements in Learned Treatises, Periodicals, or Pamphlets.

803.18.010 A statement is not excluded by the rule against hearsay if it is contained in a treatise, periodical, or pamphlet and (A) the statement is called to the attention of an expert witness on cross-examination or relied on by the expert on direct examination; and (B) the publication is established as a reliable authority by the expert's admission or testimony, by another expert's testimony, or by judicial notice; if admitted, the statement may be read into evidence but not received as an exhibit.

State v. West, 238 Ariz. 482, 362 P.3d 1049, ¶¶ 68–69 (Ct. App. 2015) (prosecutor asked expert witness if journals were reputable, and witness agreed and confirmed they were all peer-reviewed; court held prosecutor complied with this rule).

803.18.020 This rule requires that the treatise, periodical, or pamphlet be established as a reliable authority; there is no requirement that the individual articles be established as a reliable authority.

State v. West, 238 Ariz. 482, 362 P.3d 1049, ¶ 70 (Ct. App. 2015) (court rejected defendant's contention that individual articles within journals be verified as reliable).

Paragraph (19) — Reputation concerning personal or family history.

803.19.010 Reputation among members of a person's family by blood, adoption, or marriage, or among a person's associates, or in the community, about a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history is admissible as a hearsay exception.

State v. May, 210 Ariz. 452, 112 P.3d 39, ¶¶ 11[14] (Ct. App. 2005) (defendant charged with DUI with person under 15 in vehicle; officer testified that man at scene said he was defendant's brother and that person in vehicle was his 13-year-old son; court held statement was offered to prove truth of matter asserted and thus was hearsay; court noted there was no showing officer knew anyone in 13-year-old's family, and held officer was not sufficiently familiar with 13-year-old for officer's testimony to be admissible under this exception).

Paragraph (22) — Judgment of previous conviction.

803.22.005 Evidence of a final judgment, entered after a trial or upon a plea of guilty, adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, is admissible to prove any fact essential to sustain the judgment,

Picasso v. Tucson Unif. S.D., 217 Ariz. 178, 171 P.3d 1219, ¶ 7 (2007) (plaintiff's guilty plea in criminal case was admissible in civil case).

803.22.020 Under A.R.S. § 13–807, a defendant is estopped from denying the commission of the acts forming the basis for the conviction.

American Family Mutual Ins. Co. v. White, 204 Ariz. 500, 65 P.3d 449, ¶¶ 15–16 (Ct. App. 2003) (to stop White from committing assault, Travis hit White in head with metal pipe; state charged Travis with aggravated assault dangerous; to avoid mandatory prison, Travis pled guilty to non-dangerous aggravated assault; White sued Travis and his parents (the Wildes); Wildes' insurer, American Family (AmF), brought declaratory judgment action and moved for summary judgment contending White's

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claim against AmF was barred by policy provision precluding coverage if any insured violated criminal law; trial court held White stood in shoes of Travis, and because Travis was precluded from collecting from AmF, White was precluded from recovering, and thus granted summary judgment for AmF; White contended that, despite plea of guilty in criminal action, Travis should be allowed in civil action to claim he was acting in self-defense or defense of third person; court held A.R.S. § 13-807 precluded Travis from denying he violated criminal law, which would thus preclude Travis from collecting from AmF, and this precluded White from recovering from AmF).

April 1, 2020

Rule 804. Exceptions to the Rule Against Hearsay—When the Declarant Is Unavailable as a Witness.

(a) Criteria for Being Unavailable. A declarant is considered to be unavailable as a witness if the declarant:

- (1) is exempted from testifying about the subject matter of the declarant's statement because the court rules that a privilege applies;
- (2) refuses to testify about the subject matter despite a court order to do so;
- (3) testifies to not remembering the subject matter;
- (4) cannot be present or testify at the trial or hearing because of death or a then-existing infirmity, physical illness, or mental illness; or
- (5) is absent from the trial or hearing and the statement's proponent has not been able, by process or other reasonable means, to procure:
 - (A) the declarant's attendance, in the case of a hearsay exception under Rule 804(b)(1) or (5); or
 - (B) the declarant's attendance or testimony, in the case of a hearsay exception under Rule 804(b)(2), (3), or (4).

But this subsection (a) does not apply if the statement's proponent procured or wrongfully caused the declarant's unavailability as a witness in order to prevent the declarant from attending or testifying.

(b) The Exceptions. The following are not excluded by the rule against hearsay if the declarant is unavailable as a witness:

(1) *Former Testimony in a Criminal Case.* Testimony that:

(A) was made under oath by a party or witness during a previous judicial proceeding or a deposition under Arizona Rule of Criminal Procedure 15.3 shall be admissible in evidence if:

- (I) The party against whom the former testimony is offered was a party to the action or proceeding during which a statement was given and had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which the party now has (no person who was unrepresented by counsel at the proceeding during which a statement was made shall be deemed to have had the right and opportunity to cross-examine the declarant, unless such representation was waived) and
- (ii) The declarant is unavailable as a witness, or is present and subject to cross-examination.

(B) The admissibility of former testimony under this subsection is subject to the same limitations and objections as though the declarant were testifying at the hearing, except that the former testimony offered under this subsection is not subject to:

- (I) Objections to the form of the question which were not made at the time the prior testimony was given.
- (ii) Objections based on competency or privilege which did not exist at the time the former testimony was given.

(2) *Statement Under the Belief of Imminent Death.* In a prosecution for homicide or in a civil case, a statement that the declarant, while believing the declarant's death to be imminent, made about its cause or circumstances.

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(3) *Statement Against Interest.* A statement that:

(A) a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability; and

(B) is supported by corroborating circumstances that clearly indicate its trustworthiness, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability.

(4) *Statement of Personal or Family History.* A statement about:

(A) the declarant's own birth, adoption, legitimacy, ancestry, marriage, divorce, relationship by blood, adoption, or marriage, or similar facts of personal or family history, even though the declarant had no way of acquiring personal knowledge about that fact; or

(B) another person concerning any of these facts, as well as death, if the declarant was related to the person by blood, adoption, or marriage or was so intimately associated with the person's family that the declarant's information is likely to be accurate.

(5) [Formerly (7) *Other exceptions.*] [Transferred to Rule 807.]

(6) *Statement Offered Against a Party That Wrongfully Caused the Declarant's Unavailability.* A statement offered against a party that wrongfully caused—or acquiesced in wrongfully causing—the declarant's unavailability as a witness, and did so intending that result.

Comment to 2012 Amendment

Rule 804(b)(3) has been amended to conform to Federal Rule of Evidence 804(b)(3), as amended effective December 1, 2010.

To conform to Federal Rules of Evidence 804(b)(5) and 807, Rule 804(b)(7) has been deleted and transferred to Rule 807.

Rule 804(b)(1) has been amended to incorporate the language of Arizona Rule of Criminal Procedure 19.3(c), but has not been amended to conform to the federal rules.

Otherwise, the language of Rule 804 has been amended to conform to the federal restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent in the restyling to change any result in any ruling on evidence admissibility.

Comment to 1994 Amendment

For provisions governing former testimony in non-criminal actions or proceedings, see Rule 803(25).

NOTE: On March 8, 2004, the United States Supreme Court decided *Crawford v. Washington*, 541 U.S. 36 (2004), which greatly changed the law in determining whether admission of hearsay statements violated the confrontation clause. Cases decided prior to that date holding admission of certain statements did not violate the confrontation clause therefore may no longer be good law.

Cases

804.010 Considerations of public policy and the necessities of the case permit dispensing with confrontation at trial if two conditions exist: (1) the declarant's in-court testimony is unavailable; and (2) the declarant's out-of-court statement bears adequate indicia of reliability. (**Note:** contrary to *Crawford*.)

HEARSAY

State v. Huerstel, 206 Ariz. 93, 75 P.3d 698, ¶¶ 27–34 (2003) (defendant introduced statements from two inmates who claimed codefendant told them he shot all three victims; trial court then allowed state to introduce codefendant’s statement to police in which he claimed defendant shot all three victims; court held accomplice confession that implicates defendant is not within firmly rooted hearsay exception to hearsay rule, and trial court made no finding that codefendant’s statement to police bore sufficient indicia of reliability, thus trial court erred in admitting codefendant’s statement).

804.025 If a statement falls within a firmly rooted hearsay exception, the statement is considered sufficiently reliable to satisfy the reliability requirement of the confrontation clause. (**Note:** contrary to *Crawford*.)

State v. Huerstel, 206 Ariz. 93, 75 P.3d 698, ¶¶ 27–34 (2003) (defendant introduced statements from two inmates who claimed codefendant told them he shot all three victims; trial court then allowed state to introduce codefendant’s statement to police in which he claimed defendant shot all three victims; court held accomplice confession that implicates defendant is not within firmly rooted hearsay exception to hearsay rule, and trial court made no finding that codefendant’s statement to police bore sufficient indicia of reliability, thus trial court erred in admitting codefendant’s statement).

State v. Prasertphong, 206 Ariz. 70, 75 P.3d 675, ¶¶ 34–39 (2003) (defendant sought to admit portions of codefendant’s statement that were self-incriminating; state contended entire statement must be admitted, which included portions wherein codefendant shifted some responsibility to defendant; court agreed with trial court that admitting only portions of statement offered by defendant would have been misleading, thus entire statement would have to be admitted, but portion state wanted admitted would not be admissible if it violated confrontation clause; court held, however, that portion state wanted admitted sufficiently inculpated codefendant to make it admissible under Rule 804(b)(3), and fact that it was somewhat inculpatory of defendant did not make it any less inculpatory, reliable, or admissible).

State v. Bronson, 204 Ariz. 321, 63 P.3d 1058, ¶¶ 15–28 (Ct. App. 2003) (court held accomplice confessions that implicate criminal defendants and are sought to be admitted under Rule 804(b)(3) are not within firmly-rooted exception; court further found insufficient indicia of reliability, thus court held admission of transcript of accomplice’s interview conducted by defendant’s attorney was error).

Paragraph (a)(1) — Definition of unavailability—Exempt from testifying because of privilege.

804.a.1.010 If the witness has a good faith basis for invoking the Fifth Amendment privilege, the witness will be considered unavailable.

804.a.1.020 Unless the record clearly shows the declarant will invoke the Fifth Amendment privilege, the declarant will not be considered unavailable.

State v. Harrod, 200 Ariz. 309, 26 P.3d 492, ¶¶ 14–17 (2001) (defendant contended that, because declarant was under sentence of death in California, declarant would not come to Arizona and admit to committing another murder; court held that, because there was no affirmative showing declarant would have refused to testify if called as witness, defendant failed to show declarant was “unavailable” within meaning of rule 804(b)(3)).

Paragraph (a)(2) — Definition of unavailability—Refusal to testify.

804.a.2.010 A witness will be considered unavailable if the witness persists in refusing to testify about the subject matter of the witness’s statement despite an order of the court to do so.

State v. Lehr, 227 Ariz. 140, 254 P.3d 379, ¶¶ 27–35 (2011) (prior to retrial, victim said she would not testify against defendant because she opposed capital punishment; trial court threatened her with contempt, including jail for up to 6 months; she said putting her in jail or fining her would not change her mind; court held trial court did not abuse discretion in finding victim was unavailable and allowing admission of her testimony from first trial).

Paragraph (a)(3) — Definition of unavailability—Unable to testify because of lack of memory.

804.a.4.010 If the witness has a good faith loss of memory, the witness will be considered unavailable.

804.a.4.020 Whether a witness is considered “unavailable” for Sixth Amendment purposes is determined as a matter of constitutional law, and not as a matter of state evidentiary law.

State v. Real, 214 Ariz. 232, 150 P.3d 805, ¶ 11 (Ct. App. 2007) (officer administered FSTs to defendant and then took his statement; at trial, officer had no independent memory of investigation, so trial court allowed officer to read from his report; defendant contended officer was “unavailable” under Rule 804(a)(3); court held that, because officer was present and was subject to cross-examination, officer was available).

Paragraph (a)(4) — Definition of unavailability—Unable to testify because of injury or death.

804.a.4.010 A declarant who is seriously injured or incapacitated, or is dead, is unavailable.

Aranda v. Cardenas, 215 Ariz. 210, 159 P.3d 76, ¶¶ 35–37 (Ct. App. 2007) (wrongful death action when mother and child died; because mother was dead, she was unavailable; mother’s statement in her medical history and mother’s statement to relative that plaintiff was father of child was admissible).

State v. Dunlap, 187 Ariz. 441, 930 P.2d 518 (Ct. App. 1996) (declarant was dead).

Paragraph (a)(5) — Definition of unavailability—Unable to testify because of absence.

804.a.5.001 A declarant who cannot be found after a good faith effort is unavailable.

State v. Montañño, 204 Ariz. 413, 65 P.3d 61, ¶¶ 25–31 (2003) (two witnesses, who were illegal aliens, testified at preliminary hearing but were then out of country during trial; because state was able to subpoena one witness before he left country, state made good-faith effort for that witness; although state did not subpoena other witness, court concluded state had made sufficient efforts, thus trial court did not abuse discretion in concluding that witness were “unavailable” and that preliminary hearing videotape was admissible).

State v. Tankersley, 191 Ariz. 359, 956 P.2d 486, ¶¶ 44, 46 (1998) (because neither state nor defendant could find declarant, declarant was unavailable).

804.a.5.020 “Good faith effort” to locate a witness is not subject to a precise definition and is instead left to the sound discretion of the trial court.

State v. Montañño, 204 Ariz. 413, 65 P.3d 61, ¶¶ 25–31 (2003) (witnesses (illegal aliens), testified at preliminary hearing but were then out of country during trial; because state was able to subpoena one witness prior to leaving, state made good-faith effort for that witness; although state did not subpoena other witness, court concluded state had made sufficient efforts, thus trial court did not abuse discretion in concluding witness were “unavailable” and admitting preliminary hearing videotape).

State v. Rivera, 226 Ariz. 325, 247 P.3d 560, ¶¶ 12–16 (Ct. App. 2011) (evidence showed state attempted to contact witness through attorney who had been contacted during first trial, mailed subpoena to last known address, checked utilities, driver’s licenses, and criminal history, contacted law enforcement personnel and other civilian witnesses, and called three telephone numbers it had for witness; court held these efforts were reasonable; because state did not know if witness was in Mexico, state was not required to invoke international treaties in attempt to locate witness).

804.a.5.030 In a criminal prosecution, the state must make a good faith effort to obtain the witness’s presence at trial, which ordinarily would require the issuance of a subpoena, including the utilization of the Uniform Act To Secure the Attendance of a Witness From Without a State; if the witness’s whereabouts are unknown and if the state makes a diligent effort to locate the witness, issuance of a subpoena would be futile and therefore is not necessary.

HEARSAY

State v. Montañño, 204 Ariz. 413, 65 P.3d 61, ¶¶ 25–31 (2003) (witnesses (illegal aliens), testified at preliminary hearing but were then out of country during trial; because state was able to subpoena one witness prior to leaving, state made good-faith effort for that witness; although state did not subpoena other witness, court concluded state had made sufficient efforts, thus trial court did not abuse discretion in concluding witness were “unavailable” and admitting preliminary hearing videotape).

Paragraph (b)(1) — Former testimony.

804.b.1.010 The use of former testimony is an exception to the rule against hearsay whenever a witness is declared incompetent to testify or is otherwise unavailable.

State v. Montañño, 204 Ariz. 413, 65 P.3d 61, ¶¶ 25–31 (2003) (witnesses (illegal aliens), testified at preliminary hearing but were then out of country during trial; because state was able to subpoena one witness prior to leaving, state made good-faith effort for that witness; although state did not subpoena other witness, court concluded state had made sufficient efforts, thus trial court did not abuse discretion in concluding witness were “unavailable” and admitting preliminary hearing videotape).

804.b.1.020 An exception to the confrontation clause exists when the witness is unavailable but has previously testified at a judicial proceeding, subject to cross-examination, against the same defendant.

State v. Prince, 226 Ariz. 516, 250 P.3d 1145, ¶¶ 41–43 (2011) (issue of defendant’s guilt was determined by one jury, and issue of sentence was determined by another jury; at aggravation phase, state had read to jurors transcript of testimony state’s gun expert gave at guilt phase; court noted such testimony would be admissible if (1) declarant were unavailable, and (2) defendant had right and opportunity to cross-examine witness; because defendant did not object at trial, court reviewed for fundamental error only, and held defendant failed to prove prejudice because testimony had no bearing on aggravating circumstance state presented).

State v. Montañño, 204 Ariz. 413, 65 P.3d 61, ¶¶ 21–32 (2003) (two witnesses, who were illegal aliens, testified at preliminary hearing, but were then out of country during trial; because defendant had adequate opportunity to cross-examine witnesses at preliminary hearing and availed himself of that opportunity, preliminary hearing videotape bore sufficient indicia of reliability to be admissible).

804.b.1.030 The party against whom the statement is offered must have had the opportunity and a similar motive to cross-examine.

State v. Montañño, 204 Ariz. 413, 65 P.3d 61, ¶ 32 (2003) (two illegal aliens testified at preliminary hearing, but were then out of country during trial; defendant contended his attorney did not have sufficient time to prepare for preliminary hearing and thus did not have complete and adequate opportunity to cross-examine witnesses at preliminary hearing; court noted defendant’s attorney was appointed 6 days after complaint was filed and that preliminary was held 6 weeks after defendant’s attorney was appointed, and thus concluded attorney had adequate opportunity to cross-examine).

804.b.1.040 Former testimony in a criminal action is admissible as provided by Rule 19.3(c), ARIZ. R. CRIM. P.

State v. Montañño, 204 Ariz. 413, 65 P.3d 61, ¶¶ 21–32 (2003) (two witnesses, who were illegal aliens, testified at preliminary hearing, but were then out of country during trial; because defendant had adequate opportunity to cross-examine witnesses at preliminary hearing and availed himself of that opportunity, preliminary hearing videotape bore sufficient indicia of reliability, and thus was admissible under Rule 19.3(c)).

Paragraph (b)(3) — Statements against interest.

804.b.3.005 For a statement to be admissible under this exception: (1) the declarant must be unavailable; (2) the statement must be against the declarant’s interest; and (3) there must be corroborating evidence that indicates the statement’s trustworthiness.

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State v. Machado, 226 Ariz. 281, 246 P.3d 632, ¶¶ 19–22 (2011) ((1) because telephone call was from anonymous caller, caller was unavailable; (2) although call from anonymous caller usually would not be against caller’s penal interest (because caller was seeking to protect against consequences of call), in this case, police used call to get warrant for suspect’s voice sample, thus call was against penal interest; (3) other evidence corroborated statements in call about vehicles and when they arrived at house; evidence of telephone call was thus admissible).

State v. Pandeli, 200 Ariz. 365, 26 P.3d 1136, ¶ 21 (2001) (court made general statement about admissibility).

State v. Harrod, 200 Ariz. 309, 26 P.3d 492, ¶¶ 14–17 (2001) (defendant contended that, because declarant was under sentence of death in California, declarant would not come to Arizona and admit to committing another murder; court held that, because there was no affirmative showing declarant would have refused to testify if called as witness, defendant failed to show declarant was “unavailable” within meaning of rule 804(b)(3)).

State v. Dominguez, 236 Ariz. 226, 338 P.3d 966, ¶¶ 9–12 (Ct. App. 2014) (defendant sought to admit M.H.’s statement that he saw D.S. in possession of sawed-off shotgun; at best, statement suggested D.S. stole shotgun, but that would not expose M.H. to criminal liability, and statement conflicted with other evidence admitted at trial, thus trial court did not abuse discretion in excluding statement).

Cal X-tra v. W.V.S.V. Holdings, 229 Ariz. 377, 276 P.3d 11, ¶¶ 55–57 (Ct. App. 2012) (for plaintiffs’ motion for summary judgment, plaintiffs included deposition from one plaintiff [Beus] stating what Sara Taylor Hickey [Taylor] told him about source of computer disk that had on it damaging information; because Taylor was now dead and her statements about computer disk were against pecuniary interest, her statements were admissible even if hearsay).

804.b.3.007 Because the defendant has the choice whether or not to testify, the defendant is not “unavailable” to himself or herself, thus when the defendant seeks to introduce his or her own statement, that statement does not qualify under this exception.

State v. Pandeli, 200 Ariz. 365, 26 P.3d 1136, ¶¶ 21–23 (2001) (defendant sought to introduce his own statement; court held trial court properly held statement was not admissible under this exception).

804.b.3.010 Admission of a statement offered under this exception does not violate a defendant’s Sixth Amendment right of confrontation.

State v. Canaday, 141 Ariz. 31, 684 P.2d 912 (Ct. App. 1984) (statement did not have requisite indicia of reliability, therefore trial court erred in admitting it).

804.b.3.020 Exclusion of a statement offered under this exception by the defendant does not violate the defendant’s constitutional right to present evidence.

State v. LaGrand (Walter), 153 Ariz. 21, 734 P.2d 563 (1987) (because trial court will exclude such a statement only if it concludes there is no evidence upon which a reasonable person could conclude statement is truthful, application of this test is not a mechanistic application of hearsay rules, but is instead an inquiry into truthfulness of evidentiary process).

804.b.3.030 A statement is admissible if, at the time that the declarant made it, it was so contrary to the declarant’s pecuniary or proprietary interest, or subjected the declarant to civil or criminal liability, that the declarant would not have made it if it were not true.

State v. Escalante-Orozco, 241 Ariz. 254, 386 P.3d 798, ¶¶ 70–72 (2017) (victim’s boyfriend was not available at time of trial; defendant sought to admit testimony from detective that boyfriend had said he and victim had fought several days before victim was killed and that boyfriend had said he had been “bad” to his wife; court held these statements were vague and thus did not implicate criminal behavior, thus they were not admissible under this rule).

HEARSAY

State v. Tankersley, 191 Ariz. 359, 956 P.2d 486, ¶ 46 (1998) (because letter suggested that declarant had killed the victim, it was against his penal interest).

State v. Dominguez, 236 Ariz. 226, 338 P.3d 966, ¶¶ 9–12 (Ct. App. 2014) (defendant sought to admit M.H.’s statement that he saw D.S. in possession of sawed-off shotgun; at best, statement suggested D.S. stole shotgun, but that would not expose M.H. to criminal liability, thus trial court did not abuse discretion in excluding statement).

804.b.3.040 In determining the trustworthiness of a statement, the trial court does not determine whether it believes the statement, it determines only whether a reasonable juror could find that it is true.

State v. Henry, 176 Ariz. 569, 863 P.2d 861 (1993) (because no reasonable person could have believed declarant’s statement, trial court properly excluded it).

804.b.3.050 This exception is not limited to a direct confession, but the statement must at least implicate the declarant in a crime.

State v. Tankersley, 191 Ariz. 359, 956 P.2d 486, ¶ 46 (1998) (even though letter was not a confession that declarant had killed victim, because it suggested that he had killed the victim, letter was against his penal interest).

804.b.3.060 A statement offered to **exculpate** the defendant is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement; at least seven factors suggest the trustworthiness of a statement: (1) the existence of corroborating and contradicting evidence; (2) the relationship between the declarant and the listener; (3) the relationship between the declarant and the defendant; (4) the number of times the declarant made the statement and the consistency of the multiple statements; (5) the amount of time between the event and the making of the statement; (6) whether the declarant will benefit from the statement; and (7) the psychological and physical environment surrounding the making of the statement; in determining whether to admit the statement, the trial court should determine only whether evidence presented corroborating and contradicting the statement would permit a reasonable person to believe it could be true, and if so should admit the statement; only after the statement is admitted in evidence should factors other than the corroborating and contradicting evidence be considered, and then only by the jurors; appellate decisions have, however, determined admissibility of the statement based on the additional consideration of one or more of the other six factors.

State v. Parker, 231 Ariz. 391, 296 P.3d 54, ¶¶ 23–27 (2013) (defendant contended trial court abused discretion in precluding witness’s testimony: “I thought at some point that [third party] had told me that he had also gone inside [victims’] house to look for other things”; because (1) witness could not remember making statement and thus could not be cross-examined about it, (2) could not even say for sure third party made statement, (3) extensive drug use affected her memory, and (4) witness was allowed to testify she had previously told police, “It was almost like [third party] was going back to [victims’] house to try to get something out,” court held trial court did not abuse discretion).

State v. Ellison, 213 Ariz. 116, 140 P.3d 899, ¶¶ 48–51 (2006) (defendant sought to introduce statements codefendant made to fellow jail inmate; in concluding that trial court correctly excluded statements, court did not discuss any corroborating or contradicting evidence, but instead noted that trial court found that codefendant made statements while in administrative segregation in jail and housed with “the baddest of the bad,” and that codefendant feared retaliation and may have simply bragged about murders to protect himself).

State v. Harrod, 200 Ariz. 309, 26 P.3d 492, ¶¶ 18–19 (2001) (defendant charged with murder, and offered in evidence purported confession of Majors, who was under sentence of death in California; as contradiction, court noted there was no evidence Majors was at scene of crime, details in Majors’ statement were inconsistent with crime, and Majors denied any involvement in crime; court concluded trial court did not err in precluding admission of statement).

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State v. Tankersley, 191 Ariz. 359, 956 P.2d 486, ¶¶ 44–47 (1998) (defendant was charged with murder, and offered in evidence letter from Thompson to Bauer stating “this is the year for me to settle up with all who have fucked over me,” and containing newspaper clipping about victim’s murder and lawsuit Thompson had filed against victim; as contradiction, court noted there was no evidence that linked Thompson to victim’s murder, and there was evidence that eye-witness saw defendant enter victim’s room, DNA and bite-mark evidence connected defendant to victim, and no evidence placed Thompson near area where victim was killed; court also considered factor (2) and (6) Thompson could have made statement to collect debt from Bauer, and factor (4) Thompson made statement only once; court concluded trial court did not err in precluding admission of statement).

State v. Henry, 176 Ariz. 569, 575–76, 863 P.2d 861, 867–68 (1993) (defendant charged with murder, and offered Foote’s statement indicating only he, and not defendant, dragged victim to where body was found; as contradiction, court noted there were sets of footprints on either side of drag marks made by victim, there was blood on defendant’s clothing and not on Foote’s clothing, and Foote was extremely intoxicated, which made it unlikely he could have stabbed victim without getting blood on his own clothing; court also considered factor (2) Foote made statement to police, factor (3) defendant threatened Foote and his family, factor (4) statement was not spontaneous and Foote never repeated it, factor (5) Foote made statement 6 months after event, and factor (7) Foote was intoxicated at time of event, which would have cast doubt on his ability to recollect; court stated, “[w]hile the issues of trustworthiness raises questions of veracity, reliability and credibility, which are traditionally reserved to the trier of fact, we conclude here that no reasonable person could have believed Foote’s statements under the circumstances,” thus trial court did not err in precluding statement).

State v. Lopez, 159 Ariz. 52, 54–55, 764 P.2d 1111, 1113–14 (1988) (defendant charged with leaving scene of accident, and offered Guerrero’s statement that he, and not defendant, was driving car at time of accident, but trial court did not admit statement; court noted there was other evidence contradicting Guerrero’s statement, including defendant’s own admission of guilt, but as corroboration, court noted Guerrero often drove Lopez’s car and drove it night of accident, Guerrero was with Lopez night of accident, seat was forward, which was position Guerrero, and not Lopez, would use, and Guerrero offered to assume partial responsibility for repairing car; as additional evidence of corroboration, court considered factor (2) Guerrero made statement to mutual friends, defendant’s parents, and prosecuting attorney, and factor (4) Guerrero made statement no less than eight times; court concluded trial court erred in precluding admission of statement).

State v. LaGrand (Walter), 153 Ariz. 21, 25–29, 734 P.2d 563, 567–71 (1987) (Walter and Karl were charged with murder; Walter offered Karl’s statement that he stabbed victims when Walter was out of room; court identified seven factors that could be considered, and stated only corroborating and contradicting evidence went to admissibility of statement, and that other six factors related to veracity, reliability, and credibility, which were province of jurors, thus trial court should consider only corroborating and contradicting evidence and not other six factors; as corroboration, court noted one victim said other victim kicked someone, and Karl had bruise on leg, victim said one person stabbed her, and defendant said he was out of room when stabbings occurred; as contradiction, court noted one victim said she saw other victim struggling with two men, she was “positive” Walter stabbed her, and that, after stabbing, one man said to other, “Just make sure he’s dead,” and medical examiner said more than one instrument was used to stab victim; court stated that, after reviewing corroborating and contradicting evidence, it did not think any reasonable person could have concluded statement could have been true, thus trial court did not err in precluding admission of statement).

State v. Macumber, 119 Ariz. 516, 520–21, 582 P.2d 162, 166–67 (1978) (defendant charged with murder, and offered Valenzuela’s statement made to two attorneys and psychiatrist wherein he said he killed victims; court noted statements were vague and lacked details, and those details given did not correspond with physical evidence; statements therefore were inadmissible).

HEARSAY

State v. Doody, 187 Ariz. 363, 377, 930 P.2d 440, 454 (Ct. App. 1996) (defendant was charged with murder, and offered in evidence statement Caratachea made to Herron wherein Caratachea supposedly said someone other than Doody killed victims; court considered only corroborating and contradicting evidence, and as corroboration, noted Herron had piece of paper with Caratachea's signature on it, but said signature corroborated only that conversation took place and not substance of conversation; court concluded trial court did not err in precluding admission of statement).

State v. Grijalva, 137 Ariz. 10, 14–15, 667 P.2d 1336, 1340–41 (Ct. App. 1983) (defendant offered statement Corrales made wherein Corrales allegedly said that he, and not defendant, committed offense; court considered only corroborating and contradicting evidence; court noted there was no corroboration that Corrales either made statement or committed offense; court concluded trial court did not err in precluding admission of statement).

804.b.3.070 A statement offered to **inculcate** the defendant is not admissible unless corroborating circumstances and the circumstances of making the statement clearly indicate statement's trustworthiness; in assessing the circumstances of the making of the statement, the court should consider both the motives of the out-of-court declarant and the veracity of the in-court witness.

State v. Latimer, 171 Ariz. 439, 831 P.2d 438 (Ct. App. 1992) (because co-defendant had reason to deny or minimize his involvement and to fabricate or at least exaggerate defendant's culpability, co-defendant's testimony in his own trial was not reliable and should not have been admitted against defendant at defendant's trial).

State v. Daniel, 169 Ariz. 73, 817 P.2d 18 (Ct. App. 1991) (trial court erred in considering extrinsic evidence; because there was some evidence that declarant had ingested drugs, that he may have been trying to improve his own situation with police, and that he may have had some motives for revenge against defendant, statement was not admissible).

State v. Canaday, 141 Ariz. 31, 684 P.2d 912 (Ct. App. 1984) (based on circumstances surrounding taking of declarant's statement (during custodial interrogation), court concluded there were not sufficient indicia of trustworthiness present, thus it was error to admit statement).

804.b.3.075 An out-of-court statement satisfies the requirements of the confrontation clause if it comes under a firmly rooted exception to the hearsay rule; the statement of an accomplice that shifts or spreads the blame to a criminal defendant is outside the realm of those hearsay exceptions that are so trustworthy that adversarial testing can be expected to add little to the statement's reliability, thus the statement of an accomplice that inculcates a criminal defendant and does not, at the same time, implicate the declarant, is not within a firmly rooted exception to the hearsay rule and thus does not satisfy the requirements of the confrontation clause.

State v. Huerstel, 206 Ariz. 93, 75 P.3d 698, ¶¶ 27–34 (2003) (defendant introduced statements from two inmates who claimed codefendant told them he shot victims; trial court then allowed state to introduce codefendant's statement to police in which he claimed defendant shot victims; court held accomplice confession that implicates defendant is not within firmly rooted hearsay exception, and trial court made no finding that codefendant's statement to police bore sufficient indicia of reliability, thus trial court erred in admitting codefendant's statement).

State v. Prasertphong, 206 Ariz. 70, 75 P.3d 675, ¶¶ 34–39 (2003) (defendant sought to admit portions of codefendant's statement that were self-incriminating; state contended entire statement must be admitted, which included portions wherein codefendant shifted some responsibility to defendant; court held that admitting only portions of statement offered by defendant would have been misleading, thus entire statement would have to be admitted, but portion state wanted admitted would not be admissible if it violated confrontation clause; court held that portion state wanted admitted sufficiently inculpated codefendant to make it admissible under Rule 804(b)(3), and that it was somewhat inculpatory of defendant did not make it any less inculpatory, reliable, or admissible).

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State v. Bronson, 204 Ariz. 321, 63 P.3d 1058, ¶¶ 21–22 (Ct. App. 2003) (court held admission of transcript of accomplice’s interview conducted by defendant’s attorney was error).

804.b.3.080 Only a statement that inculpates the declarant is admissible, and those portions of a statement that inculcate the defendant, but do not at the same time inculcate the declarant, are not admissible.

State v. Huerstel, 206 Ariz. 93, 75 P.3d 698, ¶¶ 27–34 (2003) (defendant introduced statements from two inmates who claimed codefendant told them he shot all three victims; trial court then allowed state to introduce codefendant’s statement to police in which he claimed defendant shot all three victims; court held accomplice confession that implicates defendant is not within firmly rooted hearsay exception to hearsay rule, and trial court made no finding that codefendant’s statement to police bore sufficient indicia of reliability, thus trial court erred in admitting codefendant’s statement).

State v. Prasertphong, 206 Ariz. 70, 75 P.3d 675, ¶¶ 34–39 (2003) (defendant sought to admit portions of codefendant’s statement that were self-incriminating; state contended entire statement must be admitted, which included portions wherein codefendant shifted some responsibility to defendant; court held that admitting only portions of statement offered by defendant would have been misleading, thus entire statement would have to be admitted, but portion state wanted admitted would not be admissible if it violated confrontation clause; court held that portion state wanted admitted sufficiently inculpated codefendant to make it admissible under Rule 804(b)(3), and that it was somewhat inculpatory of defendant did not make it any less inculpatory, reliable, or admissible).

State v. Bronson, 204 Ariz. 321, 63 P.3d 1058, ¶¶ 15–28 (Ct. App. 2003) (court held accomplice confessions that implicate criminal defendants and are sought to be admitted under Rule 804(b)(3) are not within firmly-rooted exception; court further found insufficient indicia of reliability, thus court held admission of transcript of accomplice’s interview conducted by defendant’s attorney was error).

Paragraph (b)(4) — Statement of personal or family history.

804.b.4.010 If the declarant is unavailable, the declarant’s statement concerning another person’s birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history is admissible if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other’s family as to be likely to have accurate information concerning the matter declared.

Aranda v. Cardenas, 215 Ariz. 210, 159 P.3d 76, ¶¶ 35–37 (Ct. App. 2007) (in wrongful death action where mother and child died, mother’s statement in her medical history and mother’s statement to relative that plaintiff was father of child would be admissible).

Paragraph (b)(5) — [Transferred to Rule 807.]

Paragraph (b)(6) — Statement Offered Against a Party That Wrongfully Caused the Declarant’s Unavailability.

804.b.6.010 If the defendant creates the circumstances that allow for the admissibility of a statement that would otherwise violate the right of confrontation, the defendant on essentially equitable grounds forfeits the protections of the confrontation clause.

Crawford v. Washington, 541 U.S. 36, 62, 124 S. Ct. 1354, 1370 (2004) (Court stated, “[T]he rule of forfeiture by wrongdoing (which we accept) extinguishes confrontation claims on essentially equitable grounds; it does not purport to be an alternative means of determining reliability.”).

State v. Miller, 234 Ariz. 31, 316 P.3d 1219, ¶¶ 19–20 (2013) (evidence showed defendant killed victims so they would not testify against him in arson trial, admission of statements in defendant’s murder trial for killing victims did not violate confrontation clause).

HEARSAY

State v. Prasertphong, 210 Ariz. 496, 114 P.3d 828, ¶¶ 24–29 (2005) (defendant sought to introduce portion of codefendant’s statement as statement against penal interest; court held state was then entitled to introduce remaining portions of codefendant’s statement under Rule 106 that were necessary to keep jurors from being misled, and by introducing portions of codefendant’s statement, defendant forfeited confrontation clause protection for remaining portions).

State v. Franklin, 232 Ariz. 556, 307 P.3d 983, ¶¶ 11–25 (Ct. App. 2013) (court found defendant caused declarant’s unavailability, thus declarant’s statements were admissible under this rule, and further concluded defendant forfeited protections of confrontation clause).

804.b.6.020 In determining whether to admit a statement under this rule, the court must consider **four** factors, the **first** of which is whether the declarant is unavailable.

State v. Franklin, 232 Ariz. 556, 307 P.3d 983, ¶ 13 (Ct. App. 2013) (court concluded declarant was unavailable because she failed to attend trial despite state’s having served her with subpoena and issuing warrant for her arrest).

804.b.6.030 In determining whether to admit a statement under this rule, the court must consider **four** factors, the **second** of which is whether the defendant engaged in wrongdoing.

State v. Franklin, 232 Ariz. 556, 307 P.3d 983, ¶¶ 14–21 (Ct. App. 2013) (court noted criminal act is not necessary to invoke this doctrine, and that wrongdoing need not be in form of threat, request, or directive; while in jail, defendant attempted to contact declarant 109 times and spoke to her 58 times; defendant told declarant county attorney would drop charges if she told him to do so; defendant told declarant she would only face misdemeanor charges if she ignored warrant for her presence; court concluded objective of exchanges was inducing declarant to avoid testifying at trial).

804.b.6.040 In determining whether to admit a statement under this rule, the court must consider **four** factors, the **third** of which is whether the defendant engaged in, or acquiesced, in witness tampering.

State v. Franklin, 232 Ariz. 556, 307 P.3d 983, ¶¶ 22–23 (Ct. App. 2013) (court agreed that defendant’s speaking with declarant more than 50 times showed defendant engaged in wrongdoing).

804.b.6.050 In determining whether to admit a statement under this rule, the court must consider **four** factors, the **fourth** of which is whether the defendant intended to procure the declarant’s unavailability, and actually did procure the declarant’s unavailability.

State v. Franklin, 232 Ariz. 556, 307 P.3d 983, ¶¶ 24–25 (Ct. App. 2013) (court agreed that defendant’s actions were intended to procure declarant’s unavailability, and because declarant’s unwillingness to cooperate began at approximately same time defendant began making telephone calls to her, trial court could properly infer defendant’s tampering did procure declarant’s eventual absence from trial).

804.b.6.060 The admissibility of a declarant’s statement under this rule is not limited to the trial in which the declarant would have testified.

State v. Miller, 234 Ariz. 31, 316 P.3d 1219, ¶¶ 19–20 (2013) (evidence showed defendant killed victims so they would not testify against him in arson trial, but statements were also admissible in defendant’s murder trial for killing victims).

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Rule 805. Hearsay Within Hearsay.

Hearsay within hearsay is not excluded by the rule against hearsay if each part of the combined statements conforms with an exception to the rule.

Comment to 2012 Amendment

The language of Rule 805 has been amended to conform to the federal restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Cases

805.010 Multiple hearsay is admissible if each part is admissible under a hearsay exception.

State v. Smith, 215 Ariz. 221, 159 P.3d 531, ¶ 28 (2007) (because detective's report was admissible as recorded recollection, and because statements of medical examiner contained in report were admissible as present sense impressions, report satisfied hearsay requirements).

Diaz v. Magma Copper Co., 190 Ariz. 544, 950 P.2d 1165 (Ct. App. 1997) (although statement attributed to mine manager would have been admissible under Rule 801(d)(2)(D), there was no evidence of who heard mine manager make the statement, thus second level of hearsay failed).

805.020 Multiple hearsay is not admissible if either part fails to satisfy a hearsay exception.

Diaz v. Magma Copper Co., 190 Ariz. 544, 950 P.2d 1165 (Ct. App. 1997) (although statement attributed to mine manager would have been admissible under Rule 801(d)(2)(D), there was no evidence of who heard mine manager make the statement, thus second level of hearsay failed).

State v. Doody, 187 Ariz. 363, 930 P.2d 440 (Ct. App. 1996) (first level of hearsay did not qualify under Rule 804(b)(3), and second level did not qualify under Rule 804(b)(5), thus trial court did not err in precluding this evidence).

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Rule 806. Attacking and Supporting the Declarant's Credibility.

When a hearsay statement—or a statement described in Rule 801(d)(2)(C), (D), or (E)—has been admitted in evidence, the declarant's credibility may be attacked, and then supported, by any evidence that would be admissible for those purposes if the declarant had testified as a witness. The court may admit evidence of the declarant's inconsistent statement or conduct, regardless of when it occurred or whether the declarant had an opportunity to explain or deny it. If the party against whom the statement was admitted calls the declarant as a witness, the party may examine the declarant on the statement as if on cross-examination.

Comment to 2012 Amendment

The language of Rule 806 has been amended to conform to the federal restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Cases

806.010 When a hearsay statement, or a statement defined in Rule 801(d)(2)(C), (D), or (E), has been admitted in evidence, a party may introduce evidence to attack the credibility of the declarant.

State v. Ruggiero, 211 Ariz. 262, 120 P.3d 690, ¶¶ 14–17 (Ct. App. 2005) (defendant was charged with murder for shooting of 13-year-old daughter's 28-year-old boyfriend; defendant was allowed to introduce testimony from ex-girlfriend of one of defendant's friends (Soto) that Soto had said he killed boyfriend; trial court allowed state to introduce for impeachment testimony from police officer that Soto had told him that defendant had killed boyfriend).

State v. Hernandez, 191 Ariz. 553, 959 P.2d 810, ¶¶ 9–15 (Ct. App. 1998) (20 minutes after killing victim, defendant called 9-1-1 and told operator that victim had attacked him with two broken bottles and so he shot victim in self-defense; trial court held this was excited utterance, and thus admissible as a hearsay exception, but then allowed state to impeach defendant with fact of his prior conviction; court rejected defendant's contention that impeachment should not be allowed to impeach excited utterances because they are inherently reliable).

806.015 Although a party may introduce evidence to attack the credibility of a hearsay declarant, if that evidence is offered both to impeach and as substantive evidence, that evidence must satisfy the requirements of the confrontation clause; if the evidence does not satisfy the requirements of the confrontation clause, that evidence may be admitted for impeachment only, and the trial court must instruct the jurors on the limited purpose for which the evidence is admitted.

State v. Huerstel, 206 Ariz. 93, 75 P.3d 698, ¶¶ 35–36, 42 (2003) (defendant introduced statements from two inmates who claimed codefendant told them he shot all three victims; trial court then allowed state to introduce codefendant's statement to police in which he claimed defendant shot all three victims; court held accomplice confession that implicates defendant is not within firmly rooted hearsay exception to hearsay rule, and trial court made no finding that codefendant's statement to police bore sufficient indicia of reliability, thus evidence did not satisfy confrontation clause, so trial court erred in admitting codefendant's statement; court further held that, upon retrial, statement may be admitted for impeachment only, and that trial court would have to give limiting instruction, but cautioned trial court to consider whether statement should be excluded under Rule 403).

State v. Huerstel, 206 Ariz. 93, 75 P.3d 698, ¶ 42 n.9 (2003) (court noted that use of prior inconsistent statement as substantive evidence is predicated on fact that witness who made statement testifies at trial and thus is subject to cross-examination, but when prior inconsistent statement is admitted under Rule 806, declarant has not testified at trial and thus is not subject to cross-examination, so only way statement could be used is for impeachment and not as substantive evidence).

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State v. Ruggiero, 211 Ariz. 262, 120 P.3d 690, ¶¶ 14–22 (Ct. App. 2005) (defendant was charged with murder as result of shooting of 13-year-old daughter's 28-year-old boyfriend; defendant was allowed to introduce testimony from ex-girlfriend of one of defendant's friends (Soto) that Soto had said to her he killed boyfriend; trial court then allowed state to introduce for impeachment testimony from police officer that Soto had told him that defendant had killed boyfriend; court noted second statement was not offered to prove truth of matter asserted and instead was offered only for impeachment of first statement, thus confrontation clause did not bar use of that statement).

806.020 If a statement is not admitted for the truth of the matter asserted (and thus is not hearsay), the credibility of the declarant is not relevant, so the opposing party may not introduce evidence to attack the credibility of the declarant.

State v. Dunlap, 187 Ariz. 441, 930 P.2d 518 (Ct. App. 1996) (because statement was not offered to prove truth of matter asserted (Boles was investigating Funk family) but to show inadequacy of police investigation, it was not hearsay, and because it was not hearsay, state should not have been allowed to introduce evidence to impeach credibility of declarant).

806.040 The fact that the declarant is the defendant does not preclude impeachment of declarant/defendant.

State v. Hernandez, 191 Ariz. 553, 959 P.2d 810, ¶¶ 16–17 (Ct. App. 1998) (20 minutes after killing victim, defendant called 9-1-1 and told operator that victim had attacked him with two broken bottles, so he shot victim in self-defense; trial court held this was excited utterance, and thus admissible as hearsay exception, but then allowed state to impeach defendant with fact of his prior conviction; court rejected defendant's contention that impeachment should not be allowed because declarant was defendant, and impeachment would have been unduly prejudicial).

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Rule 807. Residual Exception.

(a) In General. Under the following conditions, a hearsay statement is not excluded by the rule against hearsay even if the statement is not admissible under a hearsay exception in Rule 803 or 804:

(1) the statement is supported by sufficient guarantees of trustworthiness—after considering the totality of circumstances under which it was made and evidence, if any, corroborating the statement; and

(2) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts.

(b) Notice. The statement is admissible only if the proponent gives an adverse party reasonable notice of the intent to offer the statement, including its substance and the declarant's name, so that the party has a fair opportunity to meet it. The notice must be provided in a writing filed with the court before the trial or hearing—or in a filing during the trial or hearing if the court, for good cause, excuses a lack of earlier notice.

Comment to 2019 Amendment

Rule 807 was amended to conform to the changes made to Federal Rule of Evidence 807 that took effect on December 1, 2018.

Comment to 2012 Amendment

Rule 807 has been adopted to conform to Federal Rule of Evidence 807, as restyled.

Cases

807.010 To be admissible, the statement must have equivalent circumstantial guarantees of trustworthiness that make it at least as reliable as evidence admitted under a firmly rooted hearsay exception.

State v. Escalante-Orozco, 241 Ariz. 254, 386 P.3d 798, ¶¶ 64–65 (2017) (witness made statements that victim (now deceased) told her that victim's boyfriend had bruised her arm and that he was violent with his wife; court held this was hearsay, and concluded these statements were not as reliable as statement against interest, statement of opposing party, statement of then-existing mental emotional or physical condition, or statement for medical diagnosis or treatment).

State v. Cruz, 218 Ariz. 149, 181 P.3d 196, ¶¶ 59–66 (2008) (some time after shooting, woman made statement suggesting third party may have shot police officer; woman died before trial, so defendant sought to introduce her statement; court concluded statement did not have equivalent circumstantial guarantees of trustworthiness because (1) woman had motive to lie because of her close relationship with defendant and his family, (2) she had significant criminal history, (3) statement contained several levels of hearsay, and (4) her alternative version did not fit facts of case, thus trial court did not abuse discretion in precluding statement).

807.020 To be admissible, the statement must have equivalent circumstantial guarantees of trustworthiness, which must be determined from the circumstances of the making of the statement itself, and not from other extrinsic evidence that may corroborate the statement.

State v. Roque, 213 Ariz. 193, 141 P.3d 368, ¶¶ 60–64 (2006) (for charge of first-degree murder, state's theory of case was that shootings were intentional acts of racism while intoxicated, while defendant pursued insanity defense; defendant's sister testified about their mother's mental illness; on cross-examination, prosecutor asked if her mother had ever hit her, and sister said that her grandmother told her that once her mother tried to push her into traffic; prosecutor objected and asked to have the testimony struck, which trial court did; defendant contended testimony was admissible under subsection 24; court stated there was no showing that grandmother made the statement under oath or near time of event, nor was any other indicator of reliability present, thus trial court did not err in concluding that statement did not exhibit reliability necessary to qualify as exception to hearsay rule).

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Ogden v. J.M. Steel Erecting, Inc., 201 Ariz. 32, 31 P.3d 806, ¶¶ 36–38, 40 (Ct. App. 2001) (in order to prove driving record of truck driver who caused accident, plaintiffs presented truck driver’s MVD record (listing three prior offenses) and police report of investigating officer, which contained supplement by another officer purporting to show truck driver’s alleged driving record (listing 10 additional prior offenses); because supplement was not authenticated, and because there was no evidence from which trial court could conclude it was in any way trustworthy, and because of discrepancies with certified MVD record, supplement did not have circumstantial guarantees of trustworthiness, thus trial court should not have admitted it).

State v. Dunlap, 187 Ariz. 441, 930 P.2d 518 (Ct. App. 1996) (because declarant made statements to grand jury while under oath, was defendant’s friend and had no motive to harm him, testified to matters of personal knowledge, and never recanted his testimony, statements had circumstantial guarantees of trustworthiness).

State v. Doody, 187 Ariz. 363, 930 P.2d 440 (Ct. App. 1996) (although declarant did not know defendant and therefore had no motive to lie, made statement voluntarily under oath to police, and made similar statements in other interviews, trial court reviewed his mental condition and juvenile record, and therefore did not abuse its discretion in concluding that prior statement lacked equivalent circumstantial guarantees of trustworthiness).

807.030 The statement must be offered as evidence of a material fact.

Ogden v. J.M. Steel Erecting, Inc., 201 Ariz. 32, 31 P.3d 806, ¶¶ 36–38, 40 (Ct. App. 2001) (in order to prove driving record of truck driver who caused accident, plaintiffs presented truck driver’s MVD record (listing three prior offenses) and police report of investigating officer, which contained supplement by another officer purporting to show truck driver’s alleged driving record (listing 10 additional prior offenses); because plaintiffs offered supplement to prove driving record, it was offered as evidence of a material fact).

807.040 The statement must be more probative on the point for which it is offered than other evidence that the proponent can procure through reasonable efforts.

State v. Taylor, 196 Ariz. 584, 2 P.3d 674, ¶¶ 12–14 (Ct. App. 1999) (trial court admitted pretrial videotaped statement made by minor victim; because victim was available and testified in court, hearsay statement was not more probative than the in-court testimony, and thus was not admissible under this exception).

807.050 Self-serving statements, such as claims of innocence, lack circumstantial guarantees of trustworthiness.

State v. Burns, 237 Ariz. 1, 344 P.3d 303, ¶¶ 66–70 (2015) (defendant’s statements to police that he had consensual sex with victim did not have circumstantial guarantees of trustworthiness: (1) statements were not spontaneous, but were made in response to police questioning 2 days after victim disappeared; and (2) defendant was not motivated to speak truthfully, being in police station interview room and speaking about a murder investigation).

State v. Tinajero, 188 Ariz. 350, 935 P.2d 928 (Ct. App. 1997) (after defendant was arrested for leaving the scene of an accident, he said he was not the one who had been driving the car; court held this statement lacked trustworthiness and thus was not admissible).

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ARTICLE 9. AUTHENTICATION AND IDENTIFICATION

Rule 901. Authenticating and Identifying Evidence.

(a) In General. To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.

(b) Examples. The following are examples only—not a complete list—of evidence that satisfies the requirement:

(1) *Testimony of a Witness with Knowledge.* Testimony that an item is what it is claimed to be.

(2) *Nonexpert Opinion About Handwriting.* A nonexpert's opinion that handwriting is genuine, based on a familiarity with it that was not acquired for the current litigation.

(3) *Comparison by an Expert Witness or the Trier of Fact.* A comparison with an authenticated specimen by an expert witness or the trier of fact.

(4) *Distinctive Characteristics and the Like.* The appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances.

(5) *Opinion About a Voice.* An opinion identifying a person's voice—whether heard first-hand or through mechanical or electronic transmission or recording—based on hearing the voice at any time under circumstances that connect it with the alleged speaker.

(6) *Evidence About a Telephone Conversation.* For a telephone conversation, evidence that a call was made to the number assigned at the time to:

(A) a particular person, if circumstances, including self-identification, show that the person answering was the one called; or

(B) a particular business, if the call was made to a business and the call related to business reasonably transacted over the telephone.

(7) *Evidence About Public Records.* Evidence that:

(A) a document was recorded or filed in a public office as authorized by law; or

(B) a purported public record or statement is from the office where items of this kind are kept.

(8) *Evidence About Ancient Documents or Data Compilations.* For a document or data compilation, evidence that it:

(A) is in a condition that creates no suspicion about its authenticity;

(B) was in a place where, if authentic, it would likely be; and

(C) is at least 20 years old when offered.

(9) *Evidence About a Process or System.* Evidence describing a process or system and showing that it produces an accurate result.

(10) *Methods Provided by a Statute or Rule.* Any method of authentication or identification allowed by a statute or a rule prescribed by the Supreme Court.

Comment to 2012 Amendment

The language of Rule 901 has been amended to conform to the federal restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Comment to Original 1977 Rule

This rule is declaratory of general evidence law and deals only with identification or authentication and not with grounds for admissibility.

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Cases

Paragraph (a) — General provision.

901.a.010 For the matter in question to be admissible in evidence, the proponent need only present sufficient evidence from which the trier-of-fact could conclude the matter in question is what the proponent claims it to be; whether the matter in question is in fact what the proponent claims and whether it is connected to the litigation is a question of weight and not admissibility, and is for the trier-of-fact.

State v. Forde, 233 Ariz. 543, 315 P.3d 1200, ¶¶ 73–76 (2014) (court held following was sufficient for jurors to conclude text message was intended to be sent to defendant: text message was in cell phone seized from codefendant; several communications near time of murder were sent to cell phone number attributed to “White” in cell phone address book; cell phone provider said defendant was registered subscriber for number for “White”; when arrested, defendant had cell phone with that number).

State v. Jones, 197 Ariz. 290, 4 P.3d 345, ¶¶ 47–48 (2000) (because witness was one who gave description to sketch artist and identified sketch as the one drawn from his description, state provided sufficient authentication for admission of sketch, and thus there was no need to have sketch artist testify and identify sketch).

State v. Doerr, 193 Ariz. 56, 969 P.2d 1168, ¶¶ 46–48 (1998) (because diagram helped jurors understand where various blood groups were found in apartment, it was admissible).

- * *State v. Griffith*, 247 Ariz. 361, 449 P.3d 353, ¶¶ 11–13 (Ct. App. 2019) (victims found home had been burglarized and three Apple iPads were missing; based on information victims acquired from Apple, police subpoenaed Apple and obtained information about subject named Brandon Griffith; using police database, officers found a Brandon Griffith with same address as one Apple provided; police then interviewed Griffith, who explained that others frequently brought him computer devices asking him to restore devices to their factory settings, and admitted performing this service even when he suspected devices were stolen; Griffith recalled that suspect in police’s burglary investigation had once brought him several devices to reset, including three iPads; Griffith said he communicated with suspect through Facebook, prompting the police to obtain search warrant for Griffith’s Facebook account; in response, Facebook produced, among other things, message containing photograph sent from Griffith’s account and log of account’s search history; when state sought to introduce Facebook documents as business records at trial, Griffith objected that they were inadmissible hearsay because state failed to provide certification or testimony required to admit them under Rule 803(6) (business records exception), or under Rule 902(11) (self-authentication if proper certification provided); court held Facebook records custodian would not be able to provide information from which the jurors could conclude Griffith authored message).
- * *State v. Griffith*, 247 Ariz. 361, 449 P.3d 353, ¶¶ 14–16 (Ct. App. 2019) (victims found home had been burglarized and three Apple iPads were missing; based on information victims acquired from Apple, police subpoenaed Apple and obtained information about subject named Brandon Griffith; using police database, officers found a Brandon Griffith with same address as one Apple provided; police then interviewed Griffith, who explained that others frequently brought him computer devices asking him to restore devices to their factory settings, and admitted performing this service even when he suspected devices were stolen; Griffith recalled that suspect in police’s burglary investigation had once brought him several devices to reset, including three iPads; Griffith said he communicated with suspect through Facebook, prompting the police to obtain search warrant for Griffith’s Facebook account; in response, Facebook produced, among other things, message containing photograph sent from Griffith’s account and log of account’s search history; when state sought to introduce Facebook documents as business records at trial, Griffith objected that they were inadmissible hearsay because state failed to provide certification or testimony required to admit them under Rule 803(6) (business records exception), or under Rule 902(11) (self-authentication if proper certification provided); court

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noted Facebook account from which the message was sent uses defendant's name; detective who obtained records testified she requested them by uploading search warrant through specific webpage solely for law enforcement, and Facebook delivered the records to her through that same page; defendant stated he performed factory reset on only one of three iPads he had been given by burglary suspect; consistent with that statement, Apple records show new registry in defendant's name for only one iPad; photograph of that particular iPad was attached to message sent from defendant's Facebook account; court held this was sufficient evidence from which jurors could reasonably find that Griffith himself sent message, thus trial court did not abuse its discretion in admitting message).

- * *State v. Griffith*, 247 Ariz. 361, 449 P.3d 353, ¶¶ 17–19 (Ct. App. 2019) (defendant contended trial court erred in admitting log showing searches made by Griffith's Facebook account; because there was sufficient evidence from which jurors could find defendant authored those searches, trial court did not abuse discretion in admitting that evidence).

State v. Fell (Lietzau), 242 Ariz. 134, 393 P.3d 475, ¶¶ 4–15 (Ct. App. 2017) (for charge of sexual conduct with minor, state sought to introduce recordings purportedly between defendant and victim; court noted (1) probation officer had claimed defendant told him messages were from victim; (2) messages were consistent with other evidence; (3) victim had admitted having a sexual relationship with defendant; (4) victim would testify about exchanged text messages between defendant and her; (5) recordings of jail calls showed defendant had asked family members to contact victim; (6) defendant had given phone to victim; (7) defendant referred to fact he had carved "[victim] is mine" on his arm; and (8) defendant had identified himself in one message; court held this was sufficient evidence for jurors to conclude recordings were between defendant and victim; fact that phone was not in defendant's name and other people had access to it went to weight and not admissibility).

Michaelson v. Garr, 234 Ariz. 542, 323 P.3d 1193, ¶ 9 (Ct. App. 2014) (appellant contended e-mail appellee submitted was illegible; court noted that, even though contents of e-mail were illegible, it clearly displayed appellant's name, e-mail address, and date on which it was sent, which was sufficient to authenticate e-mail; court held trial court, acting as trier-of-fact, had to determine whether act of domestic violence occurred, and illegibility went to weight and not admissibility).

State v. Miller (Estrella), 226 Ariz. 202, 245 P.3d 887, ¶¶ 7–11 (Ct. App. 2010) (state's witness had monitored and transcribed numerous wiretap recordings of conversations between defendant and persons connected with defendant, many of which were in Spanish; court held witness could authenticate law enforcement interview tapes and tapes of jailhouse telephone calls by identifying voices on tapes based on her experience with the monitoring and transcribing).

State v. Haight-Gyuro, 218 Ariz. 356, 186 P.3d 33, ¶¶ 8, 17 & n.6 (Ct. App. 2008) (state offered videotape of defendant using stolen credit card; court held following evidence was sufficient to authenticate videotape: store's loss prevention officer testified about installing and maintaining store's surveillance system, how cameras were placed, and how he could match time stamps and dollar amounts; how he had used procedure to identify videotape in question; and how he had made copy of videotape for detective; and he testified about specific items purchased; photograph in evidence of defendant at time of arrest showed him wearing shirt similar to shirt in videotape; and items recovered from defendant's home matched those being purchased in videotape; court held this was sufficient for jurors to conclude videotape accurately depicted transaction in which stolen credit card was used).

Ogden v. J.M. Steel Erecting, Inc., 201 Ariz. 32, 31 P.3d 806, ¶¶ 34–35, 40 (Ct. App. 2001) (in order to prove driving record of truck driver who caused accident, plaintiffs presented truck driver's MVD record (listing three prior offenses) and police report of investigating officer, which contained supplement by another officer purporting to show truck driver's alleged driving record (listing 10 additional prior offenses); court concluded there was not sufficient evidence for jurors to conclude (1) document was report of the other officer or (2) it was accurate account of truck driver's driving record, thus trial court should not have admitted it).

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State v. Wooten, 193 Ariz. 357, 972 P.2d 993, ¶¶ 56–58 (Ct. App. 1998) (evidence presented was that all jail telephone conversations were recorded on master microcomputer tape, and then must be transferred to cassette tape; although officer did not listen to master tape, he did listen to cassette tapes, and was able to identify most of the parties to calls; court held this was sufficient for jurors to find that these were conversations made by defendant).

901.a.020 The trial court does not determine whether the matter in question is what the proponent claims it to be; the extent of the trial court’s duty is to determine whether the proponent has presented sufficient evidence from which the trier-of-fact could find that the matter in question is what the proponent claims it to be; whether the matter in question is in fact what the proponent claims and whether it is connected to the litigation are questions of weight and not admissibility, and are for the trier-of-fact.

State v. King, 226 Ariz. 253, 245 P.3d 938, ¶¶ 8–9 (Ct. App. 2011) (during videotaped police interview and during trial testimony, witness was asked how hard defendant had kicked victim and then was asked to use chair to demonstrate how hard kick was; court held kicking of chairs was not purported replication and was instead more in nature of demonstration, thus conditions did not have to be similar and instead only had to illustrate fairly disputed trait or characteristic; trial court properly concluded it was question for jurors whether demonstrations accurately showed force defendant used).

State v. Damper, 223 Ariz. 572, 225 P.3d 1148, ¶¶ 18–19 (Ct. App. 2010) (defendant was charged with killing girlfriend (C); defendant claimed shooting was accidental; shortly before shooting, C’s friend B received text message from C’s cell phone that said, “Can you come over; me and Marcus [defendant] are fighting and I have no gas”; defendant contended text message could not be authenticated because state did not prove C sent message; court held following was sufficient for jurors to determine C. sent message: At trial, B testified she and C often communicated with text messages, that she had C’s cell-phone number on her cell-phone with nickname for C, and when message arrived, it displayed that nickname as sender of message; C’s cell-phone was found on bed next to C’s body, and there was no evidence anyone other than C used that cell-phone that morning).

State v. Haight-Gyuro, 218 Ariz. 356, 186 P.3d 33, ¶¶ 8, 17 & n.6 (Ct. App. 2008) (state offered in evidence videotape of defendant using stolen credit card to purchase various items at retail store; court stated that relative quality of videotape does not necessarily make it inaccurate, and that it is ultimately for jurors to decide whether they can identify objects and persons depicted in videotape).

State v. King, 213 Ariz. 632, 146 P.3d 1274, ¶¶ 9–11 & n.4 (Ct. App. 2006) (municipal court clerk included with records letter stating she had searched court’s records under name provided to her, and records were court’s records for that individual; records consisted of copy of traffic ticket and complaint, plea agreement, signed waiver of jury trial form, and minute entries from change-of-plea proceedings and sentencing; court held this was sufficient for jurors to find records were defendant’s records; court noted defendant did not challenge admissibility of records on hearsay grounds).

State v. Wooten, 193 Ariz. 357, 972 P.2d 993, ¶ 57 (Ct. App. 1998) (evidence presented was that all jail telephone conversations were recorded on master microcomputer tape, and then must be transferred to cassette tape; although officer did not listen to master tape, he did listen to cassette tapes, and was able to identify most of the parties to calls; court held this was sufficient for jurors to find that these were conversations made by defendant).

901.a.030 Objection of “no foundation” is insufficient to preserve the issue; the objecting party must indicate how the foundation is lacking so the party offering the evidence can overcome the shortcoming, if possible.

State v. Rodriguez, 186 Ariz. 240, 250, 921 P.2d 643, 653 (1996) (defendant objected to improper foundation for admission of earring; because defendant did not identify what foundation was lacking, trial court did not abuse discretion in admitting exhibit).

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State v. Guerrero, 173 Ariz. 169, 171, 840 P.2d 1034, 1036 (Ct. App. 1992) (defendant contended state failed to provide specifics about times, dates, places, or quantities of prior acts; court held that claim of insufficient foundation may not be raised on appeal unless appellant specifically points out to trial court alleged defects in foundation so that opponent may cure any defects).

Packard v. Reidhead, 22 Ariz. App. 420, 423, 528 P.2d 171, 174 (1974) (court noted appellee laid tenuous foundation for admission of traffic signal installation report, but held appellant's "no foundation" objection was inadequate to preserve issue for review; purpose of rule is to enable adversary to obviate objection if possible and to permit trial court to make intelligent ruling).

901.a.035 Circumstantial evidence may be used to prove authenticity of audio or video recording.

State v. Rienhardt, 190 Ariz. 579, 587–88, 951 P.2d 454, 462–63 (1997) (although recipient had never heard defendant's voice, person talking on telephone said various things that, in conjunction with other circumstantial evidence, provided sufficient evidence from which jurors could conclude person on telephone was defendant).

State v. Haight-Gyuro, 218 Ariz. 356, 186 P.3d 33, ¶¶ 7–19 (Ct. App. 2008) (state offered in evidence videotape of defendant using stolen credit card to purchase various items at retail store; because state had no witness who had viewed transaction as it happened, state was not able to present testimony that videotape accurately reflected what had happened; court held, however, that testimony about workings of surveillance system, matching of transactions with video recording, matching of items shown on videotape with items on transaction records, preparation of copy of videotape, comparison of clothing worn by person in videotape with clothing defendant wore when arrested, and comparison of items being purchased in videotape with items found on defendant's property provided sufficient information for jurors to use in determining authenticity of videotape.).

901.a.040 A proponent of physical evidence need not disprove the possibility of tampering or contamination if the party makes a reasonable showing that the item is intact and unaltered.

State v. McCray, 218 Ariz. 252, 183 P.3d 503, ¶¶ 8–15 (2008) (defendant contended state failed to establish sufficient chain of custody from time fluid samples were taken from victim's body at time of autopsy until they were delivered later that day to DPS for DNA testing; court noted that, even though neither medical examiner nor assistant testified about taking of samples, detective who attended autopsy testified he was present when swabs were taken, that swabs were then each wiped on filter paper, and that medical examiner then gave him samples in separate envelopes, and that he later delivered samples to DPS; court held trial court did not abuse discretion in admitting DNA evidence).

901.a.070 In order to enhance the punishment with a prior conviction, the state must present sufficient evidence for the trial court to conclude that a prior conviction actually occurred and that the defendant was the person who was convicted of that offense; this may be done through the use of extrinsic evidence, and a photograph and fingerprints are not required.

State v. Adams, 194 Ariz. 408, 984 P.2d 16, ¶¶ 35–37 (1999) (state presented certified copy of California Disposition of Arrest and Court Action that showed that "Adams, James Van" "dob 1/30/64" had been convicted of assault with intent to commit rape; even though California material did not include photograph and fingerprints, because name, date of birth, physical description, and social security number in California material matched those items for defendant, state presented sufficient evidence for trial court to conclude that defendant had prior conviction).to have right to tell jurors what sentence victims thought should be imposed).

State v. Robles, 213 Ariz. 268, 141 P.3d 748, ¶¶ 3, 11–17 (Ct. App. 2006) (state relied upon certified copy of record abstract ("pen pack") from Arizona Department of Corrections to prove defendant's prior convictions).

Paragraph (b)(1) — Testimony of witness with knowledge.

901.b.1.010 This section permits authentication or identification by a person with knowledge that the matter is what it is claimed to be.

State v. Boggs, 218 Ariz. 325, 185 P.3d 111, ¶¶ 68–70 (2008) (defendant objected to admission of threatening letters because he contended state presented insufficient proof he wrote them; among factors court considered was jail staff intercepted letter inmate stated defendant asked him to mail).

Cal X-tra v. W.V.S.V. Holdings, 229 Ariz. 377, 276 P.3d 11, ¶ 58 (Ct. App. 2012) (plaintiffs included statements from two plaintiffs stating from where documents were obtained).

State v. King, 226 Ariz. 253, 245 P.3d 938, ¶¶ 8–9 (Ct. App. 2011) (during videotaped police interview and during trial testimony, witness was asked how hard defendant had kicked victim and then was asked to use chair to demonstrate how hard kick was; trial court properly concluded it was question for jurors whether demonstrations accurately showed force defendant used; court held witness was person with knowledge that demonstrations were what they were claimed to be).

State v. Haight-Gyuro, 218 Ariz. 356, 186 P.3d 33, ¶¶ 7, 15–16 (Ct. App. 2008) (state offered videotape of defendant using stolen credit card; store's loss prevention officer testified about his job responsibilities in installing and maintaining store's surveillance system, how cameras were placed, and how he could match time stamps and dollar amounts to certain transactions; how he had used that procedure to identify videotape in question; and how he had made copy of videotape to give to detective; and he testified about specific items purchased with stolen credit card; court held this was sufficient for jurors to conclude videotape accurately depicted transaction in which stolen credit card was used).

901.b.1.020 The person must have personal knowledge that the matter is what it is claimed to be, and may not rely on hearsay statements of others.

Fuentes v. Fuentes, 209 Ariz. 51, 97 P.3d 876, ¶¶ 24–25 (Ct. App. 2004) (because wife testified exhibit was copy of budget she personally prepared for trial, she properly identified exhibit).

State v. Curry, 187 Ariz. 623, 931 P.2d 1133 (Ct. App. 1996) (because witness neither impounded exhibits nor filled out reports, and was not custodian of records, his testimony based on police reports was hearsay, thus trial court erred in admitting exhibits).

901.b.1.030 A party may establish the condition precedent for the admission of evidence either by chain of custody or identification testimony.

State v. Steinle (Moran), 239 Ariz. 415, 372 P.3d 939, ¶¶ 24–26 (2016) (state intended to use cell-phone video recording of fight; defendant contended state could not show chain of custody for video; court noted that state could have live witness testify whether contents of video fairly and accurately depicted events perceived by witness, thus chain-of-custody testimony was not necessary).

State v. Amaya-Ruiz, 166 Ariz. 152, 169, 800 P.2d 1260, 1277 (1990) (officer's testimony that exhibit appeared to be clothing he received from defendant, together with testimony from another officer that first officer told him he had received clothing from defendant, and testimony from victim's husband that clothing belonged to defendant, was sufficient identification for admission of clothing).

State v. Secord, 207 Ariz. 517, 88 P.3d 587, ¶¶ 17–18 (Ct. App. 2004) (testimony that each person who handled samples had signed for them and that samples were always in police possession was sufficient to show chain of custody).

State v. Portis, 187 Ariz. 336, 929 P.2d 687 (Ct. App. 1996) (because state failed to present evidence showing urine sample in question came from defendant, state failed to establish chain of custody).

AUTHENTICATION AND IDENTIFICATION

901.b.1.033 A party seeking to authenticate evidence based on a chain of custody must show continuity of possession, but it need not disprove every remote possibility of tampering.

State v. McCray, 218 Ariz. 252, 183 P.3d 503, ¶¶ 8–15 (2008) (defendant contended state failed to establish sufficient chain of custody from time fluid samples were taken from victim’s body at time of autopsy until they were delivered later that day to DPS for DNA testing; court noted that, even though neither medical examiner nor assistant testified about taking of samples, detective who attended autopsy testified he was present when swabs were taken, that swabs were then each wiped on filter paper, and that medical examiner then gave him samples in separate envelopes, and that he later delivered samples to DPS; court held trial court did abuse discretion in admitting DNA evidence).

901.b.1.035 Any flaws in the chain of custody go to weight and not admissibility.

State v. McCray, 218 Ariz. 252, 183 P.3d 503, ¶¶ 8–15 (2008) (defendant claimed state failed to establish sufficient chain of custody from when fluid samples were taken during autopsy until they were delivered later that day to DPS for DNA testing; detective who attended autopsy testified he was present when swabs were taken, that swabs were then each wiped on filter paper, and that medical examiner then gave him samples in separate envelopes, and that he later delivered samples to DPS, while DPS criminalist testified samples were in one envelope; court held that, to extent testimony was incomplete or conflicted with testimony of other witnesses, that went to weight and not admissibility).

State v. Secord, 207 Ariz. 517, 88 P.3d 587, ¶ 18 (Ct. App. 2004) (evidence that identifying labels on vials had been removed went to weight and not admissibility).

901.b.1.060 For admission of a photograph, video recording, or audio recording in evidence, the party must present sufficient evidence from which the jurors could determine the photograph or video recording accurately depicts the object in the photograph or video recording, or the audio recording accurately reproduces the thing recorded.

Lohmeier v. Hammer, 214 Ariz. 57, 148 P.3d 101, ¶¶ 7–9 (Ct. App. 2006) (defendant offered photographs of plaintiff’s vehicle and testified that photographs showed condition of vehicle after accident; court held this testimony was sufficient to support admission of photographs).

State v. Paul, 146 Ariz. 86, 87–88, 703 P.2d 1235, 1236–37 (Ct. App. 1985) (although videotape was not of finest quality, persons depicted could be readily identified by someone who knew them, and although background noise made it difficult to understand parts of conversation, listener could follow most of it, thus trial court did not abuse its discretion in admitting videotape for jurors to consider).

State v. Pereira, 170 Ariz. 450, 454–55, 825 P.2d 975, 979–80 (Ct. App. 1992) (because state presented testimony that photographs reflected condition of defendant’s van at time photographs were taken, trial court properly admitted photographs).

901.b.1.070 The person who took the photograph or made the video recording need not be the one to provide the authentication testimony and the person providing the authentication testimony need not have been present when the photograph or video recording was made; all that is necessary is for the person providing the authentication testimony to be able to attest that the photograph or video recording accurately portrays the scene or object depicted.

State v. Haight-Gyuro, 218 Ariz. 356, 186 P.3d 33, ¶¶ 7, 15–17 (Ct. App. 2008) (state offered videotape of defendant using stolen credit card to purchase items at retail store; store’s loss prevention officer testified about his responsibilities in installing and maintaining store’s surveillance system, how cameras were placed, and how he could match time stamps and dollar amounts to certain transactions; how he used that procedure to identify videotape; and how he had made copy of videotape to give to detective; and he testified about specific items purchased with stolen credit card; court held this was sufficient for jurors to conclude videotape accurately depicted transaction).

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Lohmeier v. Hammer, 214 Ariz. 57, 148 P.3d 101, ¶¶ 7–9 (Ct. App. 2006) (defendant offered photographs of plaintiff's vehicle purportedly taken by auto body shop, and testified that photographs showed condition of vehicle after accident; court held this testimony was sufficient to support admission of photographs).

901.b.1.080 Any testimony that the photograph or video recording does not accurately depict the object in the photograph or video recording goes to the weight and not the admissibility.

State v. Haight-Gyuro, 218 Ariz. 356, 186 P.3d 33, ¶ 17 (Ct. App. 2008) (court stated photograph is admissible as long as discrepancies between it and its subject are not materially misleading either because (1) they are minor or (2) witness explains then in such manner that jurors would not be misled).

Lohmeier v. Hammer, 214 Ariz. 57, 148 P.3d 101, ¶¶ 9–11 (Ct. App. 2006) (defendant offered two photographs of plaintiff's vehicle and testified that photographs showed condition of vehicle after accident; plaintiff testified that photograph appeared to be of vehicle after it had been repaired; court held trial court did not abuse discretion in admitting photographs).

Paragraph (b)(3) — Comparison by trier or expert.

901.b.3.010 Authentication or identification may be established by comparison by the trier-of-fact.

State v. Boggs, 218 Ariz. 325, 185 P.3d 111, ¶¶ 68–70 (2008) (defendant objected to admission of threatening letters because he contended state presented insufficient proof that he wrote them; among factors court considered was that nearly identical letters were sent to lead detective and to prosecutor).

State v. Cons, 208 Ariz. 409, 94 P.3d 609, ¶¶ 17–18 (Ct. App. 2004) (state submitted certified copy of defendant's prior conviction containing defendant's name, date of birth, and fingerprint; trial judge stated she recognized defendant as person she had sentenced in that case).

State v. Cons, 208 Ariz. 409, 94 P.3d 609, ¶¶ 17–18 (Ct. App. 2004) (state submitted certified copy of defendant's prior Pinal County conviction that contained defendant's name, date of birth, and fingerprint, and submitted certified copy of defendant's prior Maricopa County conviction that tied that conviction to Pinal county conviction).

901.b.3.020 Authentication or identification may be made by comparison by expert witness.

Cal X-tra v. W.V.S.V. Holdings, 229 Ariz. 377, 276 P.3d 11, ¶ 58 (Ct. App. 2012) (forensic document examiner testified handwriting on disk and documents matched that of defendant).

State v. Cons, 208 Ariz. 409, 94 P.3d 609, ¶¶ 17–18 (Ct. App. 2004) (state submitted certified copy of defendant's prior Pinal County conviction that contained defendant's name, date of birth, and fingerprint; state's expert identified fingerprint as belonging to defendant).

Paragraph (b)(4) — Distinctive characteristics and the like.

901.b.4.010 Distinctive characteristics, taken in conjunction with other circumstances, may provide authentication or identification.

State v. Boggs, 218 Ariz. 325, 185 P.3d 111, ¶¶ 68–70 (2008) (defendant objected to admission of threatening letters because he contended state presented insufficient proof that he wrote them; among factors court considered was that defendant's militia title was "Chief of Staff" and letters specifically referred to "Chief").

State v. Boggs, 218 Ariz. 325, 185 P.3d 111, ¶¶ 68–70 (2008) (defendant objected to admission of threatening letters because he contended state presented insufficient proof that he wrote them; among factors court considered was that letters stated "we know where you live," and defendant knew address of lead detective).

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Cal X-tra v. W.V.S.V. Holdings, 229 Ariz. 377, 276 P.3d 11, ¶ 58 (Ct. App. 2012) (some documents contained personal information from one defendant, and other documents referred to real estate deals for other defendants).

State v. Trujillo, 227 Ariz. 314, 257 P.3d 1194, ¶ 28 (Ct. App. 2011) (in defendant's "pen pack," name at top of fingerprint page could not be read because of way pages were stapled together, and as result, on copy disclosed to defendant's attorney, defendant's name did not appear at top of fingerprint page; court noted defendant's social security number was visible on fingerprint page, and held this connected document to defendant).

State v. George, 206 Ariz. 436, 79 P.3d 1050, ¶¶ 28–31 (Ct. App. 2003) (correction officer testified he found letter in defendant's cell beside her bed between pages in book defendant had checked out of library; letter contained angry, inculpatory statements about victim, as well as personal knowledge about attacks on victim; court held this was sufficient for jurors to conclude defendant wrote letter).

901.b.4.020 Authentication may be accomplished by circumstantial evidence.

State v. George, 206 Ariz. 436, 79 P.3d 1050, ¶¶ 28–31 (Ct. App. 2003) (correction officer testified he found letter in defendant's cell beside her bed between pages in book defendant had checked out of library; letter contained angry, inculpatory statements about victim, as well as personal knowledge about attacks on victim; court held this was sufficient for jurors to conclude defendant wrote letter).

Paragraph (b)(5) — Voice identification.

901.b.5.010 A witness may identify a voice from a tape recording.

State v. Miller (Estrella), 226 Ariz. 202, 245 P.3d 887, ¶¶ 7–11 (Ct. App. 2010) (state's witness had monitored and transcribed numerous wiretap recordings of conversations between defendant and persons connected with defendant, many of which were in Spanish; court held that witness could authenticate law enforcement interview tapes and tapes of jailhouse telephone calls by identifying voices on tapes based on her experience with the monitoring and transcribing).

Paragraph (b)(7) — Public records or reports.

901.b.7.010 This section requires the testimony of a witness that the document is a public record or report, that it is authorized by law, and was kept according to the law.

State v. King, 213 Ariz. 632, 146 P.3d 1274, ¶¶ 9–11 & n.4 (Ct. App. 2006) (municipal court clerk included with records letter stating she had searched court's records under name provided to her, and records were court's records for that individual; records consisted of copy of traffic ticket and complaint, plea agreement, signed waiver of jury trial form, and minute entries from change-of-plea proceedings and sentencing; court held this was sufficient for jurors to find records were defendant's records; court noted defendant did not challenge admissibility of records on hearsay grounds).

Paragraph (b)(9) — Process or system.

901.b.9.010 To admit evidence of a process or system, the party may present evidence describing how the process or system is used to produce a result and showing that the process or system produces an accurate result.

State v. Haight-Gyuro, 218 Ariz. 356, 186 P.3d 33, ¶¶ 15–17 (Ct. App. 2008) (state offered in evidence videotape of defendant using stolen credit card to purchase various items at retail store; state presented store's loss prevention officer, who testified about his job responsibilities in installing and maintaining store's surveillance system, how cameras were placed, and how he could match time stamps and dollar amounts to certain transactions; how he had used that procedure to identify videotape in question; court held this was sufficient for jurors to conclude videotape accurately depicted transaction in which stolen credit card was used).

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901.b.9.020 To admit evidence of electronic equipment, all that is necessary is evidence from which the jurors could conclude the equipment was functioning properly; expert testimony is not necessary.

State v. Rivers, 190 Ariz. 56, 945 P.2d 367 (Ct. App. 1997) (state presented testimony of parole officer who installed electronic monitoring ankle device, and defendant's parole officer; these officers acknowledged they were not experts, but testified about their experience with such devices; court held this was sufficient foundation to allow admission of the evidence).

901.b.9.030 Circumstantial evidence may be used to prove authenticity of sound or video recording.

State v. Rienhardt, 190 Ariz. 579, 951 P.2d 454 (1997) (although recipient had never heard defendant's voice, person talking on telephone said various things from which jurors could conclude person was defendant).

State v. Haight-Gyuro, 218 Ariz. 356, 186 P.3d 33, ¶¶ 7–19 (Ct. App. 2008) (state offered in evidence videotape of defendant using stolen credit card to purchase various items at retail store; because state had no witness who had viewed transaction as it happened, state was not able to present testimony that videotape accurately reflected what had happened; court held, however, that testimony about workings of surveillance system, matching of transactions with video recording, matching of items shown on videotape with items on transaction records, preparation of copy of videotape, comparison of clothing worn by person in videotape with clothing defendant wore when arrested, and comparison of items being purchased in videotape with items found on defendant's property provided sufficient information for jurors to use in determining authenticity of videotape.).

Paragraph (b)(10) —Methods provided by statute or rule.

901.b.10.010 A.R.S. § 13–3989.01(A) provides the records and recordings of 911 emergency telephone calls are admissible in any action without testimony from a custodian of records if they are accompanied by the form prescribed in subsection (A), and A.R.S. § 13–3989.01(B) provides 911 emergency records and recordings and any copies of them that comply with subsection (A) are deemed to be authenticated pursuant to Rule 901(b)(10).

No Arizona cases.

901.b.10.020 A.R.S. § 13–3989.02(A) provides the records and recordings of public safety radio traffic calls are admissible in any action without testimony from a custodian of records if the records and recordings are accompanied by the form prescribed in subsection (A), and A.R.S. § 13–3989.02(B) provides that radio records and recordings and any copies of them that comply with subsection (A) are deemed to be authenticated pursuant to Rule 901(b)(10).

No Arizona cases.

April 1, 2020

Rule 902. Evidence That Is Self-Authenticating.

The following items of evidence are self-authenticating; they require no extrinsic evidence of authenticity in order to be admitted:

(1) *Domestic Public Documents That Are Sealed and Signed.* A document that bears:

(A) a seal purporting to be that of the United States; any state, district, commonwealth, territory, or insular possession of the United States; the former Panama Canal Zone; the Trust Territory of the Pacific Islands; a political subdivision of any of these entities; or a department, agency, or officer of any entity named above; and

(B) a signature purporting to be an execution or attestation.

(2) *Domestic Public Documents That Are Not Sealed but Are Signed and Certified.*

A document that bears no seal if:

(A) it bears the signature of an officer or employee of an entity named in Rule 902(1)(A); and

(B) another public officer who has a seal and official duties within that same entity certifies under seal—or its equivalent—that the signer has the official capacity and that the signature is genuine.

(3) *Foreign Public Documents.* A document that purports to be signed or attested by a person who is authorized by a foreign country's law to do so. The document must be accompanied by a final certification that certifies the genuineness of the signature and official position of the signer or attester—or of any foreign official whose certificate of genuineness relates to the signature or attestation or is in a chain of certificates of genuineness relating to the signature or attestation. The certification may be made by a secretary of a United States embassy or legation; by a consul general, vice consul, or consular agent of the United States; or by a diplomatic or consular official of the foreign country assigned or accredited to the United States. If all parties have been given a reasonable opportunity to investigate the document's authenticity and accuracy, the court may, for good cause, either:

(A) order that it be treated as presumptively authentic without final certification; or

(B) allow it to be evidenced by an attested summary with or without final certification.

(4) *Certified Copies of Public Records.* A copy of an official record—or a copy of a document that was recorded or filed in a public office as authorized by law—if the copy is certified as correct by:

(A) the custodian or another person authorized to make the certification; or

(B) a certificate that complies with Rule 902(1), (2), or (3), a statute, or a rule prescribed by the Supreme Court.

(5) *Official Publications.* A book, pamphlet, or other publication purporting to be issued by a public authority.

(6) *Newspapers and Periodicals.* Printed material purporting to be a newspaper or periodical.

(7) *Trade Inscriptions and the Like.* An inscription, sign, tag, or label purporting to have been affixed in the course of business and indicating origin, ownership, or control.

(8) *Acknowledged Documents.* A document accompanied by a certificate of acknowledgment that is lawfully executed by a notary public or another officer who is authorized to take acknowledgments.

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(9) *Commercial Paper and Related Documents*. Commercial paper, a signature on it, and related documents, to the extent allowed by general commercial law.

(10) *Presumptions Under a Statute*. A signature, document, or anything else that a statute declares to be presumptively or prima facie genuine or authentic.

(11) *Certified Domestic Records of a Regularly Conducted Activity*. The original or a copy of a domestic record that meets the requirements of Rule 803(6)(A)–(C), as shown by a certification of the custodian or another qualified person that complies with a statute or a rule prescribed by the Supreme Court. Before the trial or hearing, the proponent must give an adverse party reasonable written notice of the intent to offer the record—and must make the record and certification available for inspection—so that the party has a fair opportunity to challenge them.

(12) *Certified Foreign Records of a Regularly Conducted Activity*. In a civil case, the original or a copy of a foreign record that meets the requirements of Rule 902(11), modified as follows: the certification, rather than complying with a statute or Supreme Court rule, must be signed in a manner that, if falsely made, would subject the maker to a criminal penalty in the country where the certification is signed. The proponent must also meet the notice requirements of Rule 902(11).

(13) **Certified Records Generated by an Electronic Process or System**. A record generated by an electronic process or system that produces an accurate result, as shown by a certification of a qualified person that complies with the certification requirements of Rule 902(11) or (12). The proponent must also meet the notice requirements of Rule 902(11).

(14) **Certified Data Copied from an Electronic Device, Storage Medium, or File**. Data copied from an electronic device, storage medium, or file, if authenticated by a process of digital identification, as shown by a certification of a qualified person that complies with the certification requirements of Rule 902(11) or (12). The proponent also must meet the notice requirements of Rule 902(11).

Comment to 2018 Amendment Adding Subdivision (13)

The amendment sets forth a procedure by which parties can authenticate certain electronic evidence other than through the testimony of a foundation witness. As with the provisions on business records in Rules 902(11) and (12), the Court has determined that the expense and inconvenience of producing a witness to authenticate an item of electronic evidence is often unnecessary. It is often the case that a party goes to the expense of producing an authentication witness and then the adversary either stipulates authenticity before the witness is called or fails to challenge the authentication testimony once it is presented. The amendment provides a procedure under which the parties can determine in advance of trial whether a real challenge to authenticity will be made, and can then plan accordingly.

A proponent establishing authenticity under this Rule must present a certification containing information that would be sufficient to establish authenticity were that information provided by a witness at trial. If the certification provides information that would be insufficient to authenticate the record if the certifying person testified, then authenticity is not established under this Rule. The Rule specifically allows the authenticity foundation that satisfies Rule 901(b)(9) to be established by a certification rather than the testimony of a live witness.

The reference to the “certification requirements of Rule 902(11) or (12)” is only to the procedural requirements for a valid certification. There is no intent to require, or permit, a certification under this rule to prove the requirements of Rule 803(6). Rule 902(13) is solely limited to authentication and any attempt to satisfy a hearsay exception must be made independently.

AUTHENTICATION AND IDENTIFICATION

In order to provide the adverse party with an opportunity to properly analyze the issue of authenticity, the “record” provided by the proponent of the ESI evidence must include the metadata for the material in question if reasonably necessary to assess the material’s authenticity. In addition, a challenge to the authenticity of electronic evidence may require technical information about the system or process at issue, including possibly retaining a forensic technical expert; such factors will affect whether the opponent has a fair opportunity to challenge the evidence given the notice provided.

Comment to 2018 Amendment Adding Subdivision (14)

The amendment sets forth a procedure by which parties can authenticate data copied from an electronic device, storage medium, or an electronic file, other than through the testimony of a foundation witness. As with the provisions on business records in Rules 902(11) and (12), the Court has determined that the expense and inconvenience of producing an authenticating witness for this evidence is often unnecessary. It is often the case that a party goes to the expense of producing an authentication witness, and then the adversary either stipulates authenticity before the witness is called or fails to challenge the authentication testimony once it is presented. The amendment provides a procedure in which the parties can determine in advance of trial whether a real challenge to authenticity will be made, and can then plan accordingly.

Today, data copied from electronic devices, storage media, and electronic files are ordinarily authenticated by “hash value.” A hash value is a number that is often represented as a sequence of characters and is produced by an algorithm based upon the digital contents of a drive, medium, or file. If the hash values for the original and copy are different, then the copy is not identical to the original. If the hash values for the original and copy are the same, it is highly improbable that the original and copy are not identical. Thus, identical hash values for the original and copy reliably attest to the fact that they are exact duplicates. This amendment allows self-authentication by a certification of a qualified person that the person checked the hash value of the proffered item and that it was identical to the original. The rule is flexible enough to allow certifications through processes other than comparison of hash value, including by other reliable means of identification provided by future technology.

In order to provide the adverse party with an opportunity to properly analyze the issue of authenticity, the “record” provided by the proponent of the ESI evidence must include the metadata for the material in question if reasonably necessary to assess the material’s authenticity. In addition, a challenge to the authenticity of electronic evidence may require technical information about the system or process at issue, including possibly retaining a forensic technical expert; such factors will affect whether the opponent has a fair opportunity to challenge the evidence given the notice provided.

Comment to 2012 Amendment

The language of Rule 902 has been amended to conform to the federal restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Comment to Original 1977 Rule

The language “general commercial law” in (9) is carried forward from the Federal Rule. In Arizona, the reference is to the Uniform Commercial Code as adopted in this State.

Cases

Paragraph (4) — Certified copies of public records.

902.4.010 A copy of a public record is admissible if it is accompanied by a certificate from the custodian or other person so authorized certifying that the copy is correct, and the certificate satisfies the requirements of either paragraph (1), (2), or (3).

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State v. Shivers, 230 Ariz. 91, 280 P.3d 635, ¶ 6 n.2 (Ct. App. 2012) (defendant charged with interfering with judicial process; defendant did not contest that written declaration of service qualified as self-authenticating).

State v. King, 213 Ariz. 632, 146 P.3d 1274, ¶¶ 5–8 (Ct. App. 2006) (records from municipal court did not include certificate required by this rule, thus they were not self-authenticating under this rule; court held, however, that they were authenticated under Rule 901(b)(7)).

State v. Cons, 208 Ariz. 409, 94 P.3d 609, ¶ 18 (Ct. App. 2004) (court held certified copies of defendant's prior convictions were admissible under this rule).

Ogden v. J.M. Steel Erecting, Inc., 201 Ariz. 32, 31 P.3d 806, ¶¶ 34–35 (Ct. App. 2001) (plaintiffs offered driver's MVD record (listing three prior offenses) and police reports purporting to show truck alleged driving record (listing 10 additional prior offenses); MVD record was certified and thus self-authenticating, a fact to which parties stipulated).

Paragraph (8) — Acknowledged Documents.

902.8.010 A document accompanied by a certificate of acknowledgment that is lawfully executed by a notary public or another officer who is authorized to take acknowledgments is self-authenticating and requires no extrinsic evidence of authenticity in order to be admitted.

State v. Solis, 236 Ariz. 242, 338 P.3d 982, ¶¶ 8–10 (Ct. App. 2014) (defendant contended trial court erred in admitting “pen pack” because notary performed jurat rather than acknowledgment; court noted acknowledgment is notarial act in which notary certifies that signer, whose identity is proved by satisfactory evidence, appeared before notary and acknowledged that signer signed document, while jurat is notarial act in which notary certifies that signer, whose identity is proved by satisfactory evidence, appeared before notary and acknowledged that signer signed document and has taken oath or affirmation vouching for truthfulness of signed document; court agreed that notary performed jurat rather than acknowledgment, but held jurat accomplished same purpose as acknowledgment).

State v. Solis, 236 Ariz. 242, 338 P.3d 982, ¶ 11 (Ct. App. 2014) (court rejected defendant's contention that acknowledgment was of AzDOC administrator's affidavit and not “pen pack” itself; court noted administrator's signature and notary's acknowledgment on last page served to verify entire pen pack).

Paragraph (11) — Certified Domestic Records of a Regularly Conducted Activity.

902.11.010 This section allows for the admission of the original or a copy of a domestic record that meets the requirements of Rule 803(6)(A)–(C), as shown by a certification of the custodian or another qualified person that complies with a statute or a rule prescribed by the Supreme Court.

- * *State v. Griffith*, 247 Ariz. 361, 449 P.3d 353, ¶¶ 11–13 (Ct. App. 2019) (victims found home had been burglarized and three Apple iPads were missing; based on information victims acquired from Apple, police subpoenaed Apple and obtained information about subject named Brandon Griffith; police interviewed Griffith, who explained that others frequently brought him computer devices asking him to restore them to their factory settings, and admitted doing so even when he suspected devices were stolen; Griffith recalled that suspect in police's burglary investigation had once brought him several devices to reset, including three iPads; Griffith said he communicated with suspect through Facebook, prompting police to obtain search warrant for Griffith's Facebook account; in response, Facebook produced, among other things, message containing photograph sent from Griffith's account and log of account's search history; when state sought to introduce Facebook documents as business records at trial, Griffith objected because state failed to provide certification or testimony required under Rule 803(6) (business records exception), or Rule 902(11) (self-authentication if proper certification provided); court held Facebook records custodian would not be able to show that defendant authored message).

April 1, 2020

Rule 903. Subscribing Witness's Testimony.

A subscribing witness's testimony is necessary to authenticate a writing only if required by the law of the jurisdiction that governs its validity.

Comment to 2012 Amendment

The language of Rule 903 has been amended to conform to the federal restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Cases

No Arizona cases.

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ARTICLE 10. CONTENTS OF WRITINGS, RECORDINGS, AND PHOTOGRAPHS

Rule 1001. Definitions That Apply to This Article.

In this article:

- (a) A “writing” consists of letters, words, numbers, or their equivalent set down in any form.
- (b) A “recording” consists of letters, words, numbers, or their equivalent recorded in any manner.
- (c) A “photograph” means a photographic image or its equivalent stored in any form.
- (d) A “video” is an electronic visual medium for the recording, copying, playback, broadcasting, or displaying of moving images, which may or may not contain an audio recording.
- (e) An “original” of a writing, recording, or video means the writing, recording, or video itself or any counterpart intended to have the same effect by the person who executed, issued, or created it. For electronically stored information, “original” means any printout—or other output perceived by sight—if it accurately reflects the information. An “original” of a photograph includes the negative or a print from it.
- (f) A “duplicate” means a counterpart produced by a mechanical, photographic, chemical, electronic, or other equivalent process or technique that accurately reproduces the original.

Comment to 2012 Amendment

The language of Rule 1001 has been amended to conform to the federal restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Paragraph (1) — Writings and recordings.

1001.a.010 A “writing” consists of letters, words, numbers, or their equivalent set down in any form, which includes handwritten documents.

Henricks v. Arizona DES, 229 Ariz. 47, 270 P.3d 874, ¶¶ 20–21 (Ct. App. 2012) (court held ALJ could properly consider handwritten documents at administrative hearing).

Paragraph (2) — Photographs.

No Arizona cases.

Paragraph (3) — Original.

1001.3.010 Any printout or other output readable by sight, shown to reflect accurately the data stored in a computer or similar device, is an original.

State v. Irving, 165 Ariz. 219, 797 P.2d 1237 (Ct. App. 1990) (because statute required custodian of records to certify that computer printout was true reproduction of motor vehicle records contained in computer, printout was an original).

Paragraph (4) — Duplicate.

No Arizona cases.

April 1, 2020

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Rule 1002. Requirement of the Original.

An original writing, recording, photograph, or video is required in order to prove its content unless these rules or an applicable statute provides otherwise.

Comment to 2012 Amendment

The language of Rule 1002 has been amended to conform to the federal restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Cases

1002.010 The rule requiring production of the original applies only when a party seeks to prove the contents of a writing, recording, or photograph without producing the writing, recording, or photograph itself.

State v. Steinle (Moran), 239 Ariz. 415, 372 P.3d 939, ¶¶ 18–20 (2016) (witness used cell phone to record fight, cropped first 4½ minutes of recording, and saved remaining 31 seconds of recording; court noted state was not seeking to prove contents of video, and was instead intending to use video to illustrate live testimony from witness, thus Rule 1002 did not apply).

State v. Smith, 122 Ariz. 58, 593 P.2d 281 (1979) (rule does not prohibit party from introducing photograph of physical object rather than object itself).

Strawberry Water Co. v. Paulsen, 220 Ariz. 401, 207 P.3d 654, ¶ 9 & n.2 (Ct. App. 2008) (lawsuit was over ownership of water used to fill pond; defendant contended plaintiff was required to prove ownership using sales documents and ownership certificates; court stated that plaintiff was not limited to sales documents and ownership certificates, but could have used any other admissible evidence to establish its rights to water).

W.F. Dunn, Sr. & Son v. Industrial Comm'n, 160 Ariz. 343, 773 P.2d 241 (Ct. App. 1989) (because plaintiff was attempting to prove fact of his prior conviction and not contents of documentary evidence of conviction, plaintiff did not need original writing).

State v. Lacey, 143 Ariz. 507, 694 P.2d 795 (Ct. App. 1984) (state had filed petition asking trial court to require bond of witness; trial court properly refused defendant's request to admit in evidence petition and minute entry setting bond because (a) they were not relevant, (b) witness testified about petition to set bond, and (c) rule requiring production of original documents did not apply).

1002.020 The rule does not require the production of an original writing, recording, or photograph to prove an event that existed independently of its description in such writing, recording, or photograph.

State v. Steinle (Moran), 239 Ariz. 415, 372 P.3d 939, ¶¶ 19–20 (2016) (witness used cell phone to record fight, cropped first 4½ minutes of recording, and saved remaining 31 seconds of recording; court noted state was not seeking to prove contents of video, and was instead intending to use video to illustrate live testimony from witness, thus Rule 1002 did not apply).

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Rule 1003. Admissibility of Duplicates.

A duplicate is admissible to the same extent as the original unless a genuine question is raised about the original's authenticity or the circumstances make it unfair to admit the duplicate.

Comment to 2012 Amendment

The language of Rule 1003 has been amended to conform to the federal restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Cases

1003.010 A duplicate is admissible to the same extent as an original unless there is a genuine question whether the original is authentic.

State v. Ritacca, 169 Ariz. 401, 819 P.2d 987 (Ct. App. 1991) (defendant made no claim that original business records were not authentic; trial court properly admitted duplicates).

1003.020 A duplicate is admissible to the same extent as an original unless, under the circumstances, it would be unfair to admit the duplicate in lieu of the original.

State v. Ritacca, 169 Ariz. 401, 819 P.2d 987 (Ct. App. 1991) (defendant made no claim that it would be unfair to admit duplicate business records; trial court properly admitted them).

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Rule 1004. Admissibility of Other Evidence of Contents.

An original is not required and other evidence of the content of a writing, recording, photograph, or video is admissible if:

- (a) all the originals are lost or destroyed, and not by the proponent acting in bad faith;
- (b) an original cannot be obtained by any available judicial process;
- (c) the party against whom the original would be offered had control of the original; was at that time put on notice, by pleadings or otherwise, that the original would be a subject of proof at the trial or hearing; and fails to produce it at the trial or hearing; or
- (d) the writing, recording, photograph, or video is not closely related to a controlling issue.

Comment to 2012 Amendment

The language of Rule 1004 has been amended to conform to the federal restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Cases

1004.010 If a party is able to prove that a writing did exist and establish one of the requirements of Rule 1004, the party may present oral evidence of the contents of the writing.

Coombs v. Lufkin, 123 Ariz. 210, 598 P.2d 1029 (Ct. App. 1979) (plaintiffs claimed that defendants had signed letter agreement wherein they agreed to pay plaintiffs' creditors; defendants contended letter never existed).

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Rule 1005. Copies of Public Records To Prove Content.

The proponent may use a copy to prove the content of an official record—or of a document that was recorded or filed in a public office as authorized by law—if these conditions are met: the record or document is otherwise admissible; and the copy is certified as correct in accordance with Rule 902(4) or is testified to be correct by a witness who has compared it with the original. If no such copy can be obtained by reasonable diligence, then the proponent may use other evidence to prove the content.

Comment to 2012 Amendment

The language of Rule 1005 has been amended to conform to the federal restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Cases

1005.010 If an original minute entry is admissible, a certified copy would be admissible.

State v. Stone, 122 Ariz. 304, 594 P.2d 558 (Ct. App. 1979) (to prove prior conviction, state introduced certified copy of minute entry showing pronouncement of judgment and sentence).

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Rule 1006. Summaries To Prove Content.

The proponent may use a summary, chart, or calculation to prove the content of voluminous writings, recordings, photographs, or videos that cannot be conveniently examined in court. The proponent must make the originals or duplicates available for examination or copying, or both, by other parties at a reasonable time or place. And the court may order the proponent to produce them in court.

Comment to 2012 Amendment

The language of Rule 1006 has been amended to conform to the federal restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Comment to Original 1977 Rule

This rule is not intended to change foundation requirements for summaries. The person creating a summary will ordinarily be required to lay the foundation and be available for cross-examination.

Cases

1006.010 This rule authorizes use of summaries when the contents of “voluminous writings” cannot be conveniently examined in court.

State v. Apelt (Michael), 176 Ariz. 349, 861 P.2d 634 (1993) (state was allowed to have accountant summarize deposits and expenditures in joint checking account belonging to defendant and victim).

Rayner v. Stauffer Chem. Co., 120 Ariz. 328, 585 P.2d 1240 (Ct. App. 1978) (witness allowed to summarize results of tests made in course of defendant’s business).

1006.020 The court shall allow the contents of voluminous writings, recordings, or photographs to be presented in the form of a chart, summary, or calculation if they cannot conveniently be examined in court, and the originals or duplicates are made available for examination or copying by other parties.

Crackel v. Allstate Ins. Co., 208 Ariz. 252, 92 P.3d 882, ¶¶ 55–57 (Ct. App. 2004) (defendant’s expert presented statistical study and charts showing relationship between defendant’s offers in minor impact soft tissue cases and ultimate jury awards in those cases, and relied in part on information defendant had supplied; court concluded defendant had produced all information used to produce charts).

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Rule 1007. Testimony or Statement of a Party To Prove Content.

The proponent may prove the content of a writing, recording, photograph, or video by the testimony, deposition, or written statement of the party against whom the evidence is offered. The proponent need not account for the original.

Comment to 2012 Amendment

The language of Rule 1007 has been amended to conform to the federal restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Cases

No Arizona cases.

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Rule 1008. Functions of the Court and Jury.

Ordinarily, the court determines whether the proponent has fulfilled the factual conditions for admitting other evidence of the content of a writing, recording, or photograph under Rule 1004 or 1005. But in a jury trial, the jury determines—in accordance with Rule 104(b)—any issue about whether:

- (a) an asserted writing, recording, photograph, or video ever existed;
- (b) another one produced at the trial or hearing is the original; or
- (c) other evidence of content accurately reflects the content.

Comment to 2012 Amendment

The language of Rule 1008 has been amended to conform to the federal restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Cases

No Arizona cases.

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ARTICLE 11. MISCELLANEOUS RULES

Rule 1101. Applicability of the Rules.

(a) Courts and magistrates. These rules apply to all courts of the State and to magistrates, and court commissioners and justices of the peace, masters and referees in actions, cases, and proceedings and to the extent hereinafter set forth. The terms “judge” and “court” in these rules include magistrates, court commissioners and justices of the peace.

(b) Proceedings generally. These rules apply generally to civil actions and proceedings, to contempt proceedings except those in which the court may act summarily, and to criminal cases and proceedings except as otherwise provided in the Arizona Rules of Criminal Procedure.

(c) Rule of privilege. The rule with respect to privileges applies at all stages of all actions, cases, and proceedings.

(d) Exceptions. These rules—except those on privilege—do not apply to grand jury proceedings.

Comment to 2012 Amendment

The title and language of Rule 1101(d) have been amended to conform to the federal restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

No changes have been made to Rule 1101(a), (b), and (c).

Comment to Original 1977 Rule

Federal Rule 1101 has been supplanted by one that conforms to Arizona state practice. *See also* Rule 19.3, Arizona Rules of Criminal Procedure.

Cases

Paragraph (a) — Courts and magistrates.

1101.a.010 Information sufficient to establish probable cause to believe the existence of criminal behavior need not pass the test of admissibility under the Rules of Evidence.

State v. Superior Ct. (Blake), 149 Ariz. 269, 718 P.2d 171 (1986) (all that is needed is reasonably trustworthy information sufficient to lead a reasonable person to believe an offense has been committed and that a particular person committed it).

Paragraph (b) — Proceedings generally.

1101.b.010 Information sufficient to establish probable cause to arrest need not pass the test of admissibility under the Rules of Evidence.

State v. Superior Ct. (Blake), 149 Ariz. 269, 718 P.2d 171 (1986) (evidence does not have to be admissible to establish probable cause).

1101.b.020 The Rules of Evidence do not apply in those criminal proceedings when the Arizona Rules of Criminal Procedure provide they do not apply.

Mendez v. Robertson (State), 202 Ariz. 128, 42 P.3d 14, ¶ 10 (Ct. App. 2002) (Rule 7.4(c), Ariz. R. Crim., provides trial court may make release determinations based on evidence not admissible under rules of evidence, thus trial court properly considered prosecutor’s avowals of what victim would say, and defendant did not have right to cross-examine victim).

Davis v. Winkler, 164 Ariz. 342, 793 P.2d 99 (Ct. App. 1990) (Rule 7.4(d), ARIZ. R. CRIM. P., provides that release determinations may be based on evidence not admissible under Rules of Evidence, thus trial court properly considered 11-year-old police report on defendant).

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1101.b.030 The Rules of Evidence do not apply during the penalty phase of a capital trial, but the state may only introduce evidence that is relevant to any of the mitigating circumstances or that tends to show that the defendant should not be shown leniency, and whether evidence falls within these categories is guided by fundamentally the same considerations as a relevancy determination under Rule 401 and Rule 403 of the Arizona Rule of Evidence.

State v. Guarino, 238 Ariz. 437, 362 P.3d 484, ¶¶ 6–8 (2015) (defendant’s participation in murder was important consideration in penalty phase, so codefendant’s statements implicating defendant as major participant were relevant and rebutted defendant’s mitigation claim that others influenced him to commit murder).

State v. Walton, 159 Ariz. 571, 769 P.2d 1017 (1989) (pre-Rule 11 screening report).

1101.b.040 The admissibility of evidence in a juvenile dependency, guardianship, or termination proceeding shall be governed by the Arizona Rules of Evidence.

Kimu P. v. Arizona D.E.S., 218 Ariz. 39, 178 P.3d 511, ¶ 10 & n.2 (Ct. App. 2008) (court cited to Rule 45(A) of the Rules of Procedure for the Juvenile Court, and assessed relevance of evidence under Rule 401 of the Arizona Rules of Evidence).

1101.b.050 If a statute so provides, the Arizona Rules of Evidence do not apply in an administrative hearing; the administrative law judge nonetheless is required to apply procedural rules to achieve substantial justice.

T.W.M. Custom Framing v. Industrial Comm’n, 198 Ariz. 41, 6 P.2d 745, ¶ 23 (Ct. App. 2000) (one witness testified by telephone, ALJ considered deposition of another, and nine witnesses gave live testimony; court cited to A.R.S. § 23–941(F) and concluded substantial justice was done).

Ciulla v. Miller, 169 Ariz. 539, 821 P.2d 201 (Ct. App. 1991) (statute provided that Arizona Rules of Evidence do not apply in Department of Transportation administrative hearing; because state followed rules and regulations of MVD pertaining to admission of intoxilyzer results, ALJ properly admitted this evidence).

Ciulla v. Miller, 169 Ariz. 539, 821 P.2d 201 (Ct. App. 1991) (because document showed that person was qualified by Arizona Department of Health Services and followed proper steps in testing intoxilyzer, ALJ properly admitted this evidence).

Ciulla v. Miller, 169 Ariz. 539, 821 P.2d 201 (Ct. App. 1991) (because defendant could have subpoenaed original Department of Health Services records and person who tested intoxilyzer, admission of document showing testing of intoxilyzer, which verified it was functioning properly, did not deny defendant the right of confrontation).

State v. Industrial Comm’n, 159 Ariz. 553, 769 P.2d 461 (Ct. App. 1989) (although ALJ in a workers’ compensation proceeding was not bound by Rules of Evidence, right of cross-examination was necessary for substantial justice; ALJ therefore erred in considering as substantive evidence report upon which witness relied because party did not have opportunity to cross-examine person who prepared report).

Paragraph (c) — Rule of privilege.

No Arizona cases.

Paragraph (d) — Rules inapplicable.

1101.d.005 Except for rules relating to privilege, the Rules of Evidence do not apply in proceedings before a grand jury.

State v. Baumann, 125 Ariz. 404, 408, 610 P.2d 38, 42 (1980) (grand jurors may consider hearsay evidence).

MISCELLANEOUS RULES

State ex rel. Berger v. Myers (James), 108 Ariz. 248, 250, 495 P.2d 844, 846 (1972) (defendant contended grand jurors were not permissible to hear what defendant characterized as illegally obtained wiretap evidence; court held exclusionary rule did not apply in grand jury proceedings).

1101.d.020 It is permissible to use hearsay evidence to support a grand jury indictment.

State v. Baumann, 125 Ariz. 404, 408, 610 P.2d 38, 42 (1980) (court stated, “Appellant’s claim that an indictment may not be returned on hearsay evidence finds no support in the law of Arizona”).

Korzep v. Superior Ct., 155 Ariz. 303, 746 P.2d 44 (Ct. App. 1987) (police officer summarized opinion given by medical examiner about injuries to victim and victim’s ability to move after being stabbed).

1101.d.030 If it is highly probable the grand jurors would not have indicted had they heard the testimony of the expert declarant rather than a hearsay version, the matter must be remanded to allow the grand jurors the opportunity to make the determination from the live testimony.

Korzep v. Superior Ct., 155 Ariz. 303, 746 P.2d 44 (Ct. App. 1987) (because police officer misconstrued opinion given by medical examiner about injuries to victim and victim’s ability to move after being stabbed, appellate court held matter must be remanded to grand jurors for new determination).

1101.d.040 It is permissible to use hearsay evidence at a hearing under A.R.S. § 13–3961 to determine whether the proof is evident or the presumption is great that the defendant committed one of the offenses for which bail is not available.

Simpson v. Owens, 207 Ariz. 261, 85 P.3d 478, ¶¶ 43–44 (Ct. App. 2004) (court concluded procedure at bail hearing is more like probable cause determination than a trial).

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Rule 1102. Amendments.

These rules may be amended as provided in Rule 28, Rules of the Supreme Court.

Comment to 2012 Amendment

Rule 1102 has been added to be consistent with Federal Rule of Evidence 1102, as restyled.

Cases

No Arizona cases.

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Rule 1103. Title.

These rules may be cited as the Arizona Rules of Evidence.

Comment to 2012 Amendment

The language of Rule 1103 has been amended to conform to the federal restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Cases

No Arizona cases.

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